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Supreme Court of the United States

OCTOBER TERM, 1945

No. 384

FORREST S. SMITH, TRUSTEE OF THE PROPERTY OF HOBOKEN MANUFACTURERS RAILROAD COMPANY, DEBTOR, ET AL., PETITIONERS,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, AND HOBOKEN LAND AND IMPROVEMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1945.

CERTIORARI GRANTED OCTOBER 22, 1945.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Appendix to Appellants' Brief

In United States District Court, District of New Jersey

Relevant Docket Entries

July 26, 1943. Petition for Reorganization under Section 77 filed 10:00 A. M. at Newark, N. J.

July 26, 1943. Order approving Petition as properly filed & designating Sept. 10, 1943, for filing a statement of Assets & Liabilities and order for hearing on 8/23/43 for the appointment of Trustee.

Aug. 5, 1943. Order with respect to the mailing of Notice approving payment of City Taxes, etc.

Aug. 6, 1943. Debtor's report of mailing and publication of Notice.

Aug. 18, 1943. Answer of Respondent, The Pennsylvania R. R. Co.

Sept. 1, 1943. Order continuing hearing for appointment of Trustees.

Sept. 9, 1943. Statement of operations and balance sheet from 7/27/43 to 7/31/43.

Sept. 9, 1943. Statement of Assets and Liabilities.

Sept. 13, 1943. Reply of Debtor to answer of The Pennsylvania R. R. Co.

Oct. 11, 1943. Order appointing Forrest S. Smith, Shrewsbury Trustee.

Oct. 11, 1943. Minutes.

Oct. 11, 1943. Testimony.

Oct. 22, 1943. Statement of Operations and Balance Sheet month of August, 1943.

Oct. 22, 1943. Railroad Primary Blanket Fidelity-Culpable Negligence Bond No. F.50107; with Rider and Amendment to Joint Insured Rider.

[fol. 2] Oct. 29, 1943. Order for the payment of City Taxes due the City of Hoboken—Order No. 6 (Fake).

Nov. 6, 1943. Statement of Operations and Balance Sheet Month of Sept. 1943.

Nov. 12, 1943. Bond of Trustee.

Nov. 12, 1943. Oath of Office of Trustee.

Nov. 15, 1943. Petition and order fixing Payment of compensation of Trustee.

Nov. 24, 1943. Petition for leave to pay real estate and franchise taxes.

Nov. 24, 1943. Affidavit of mailing notice of motion re: payment of real estate and franchise taxes, returnable 11/29/43.

Nov. 29, 1943. Hearing on Trustee's Petition for order to pay real estate and franchise taxes, etc. (cal.) (Fake) No opposition.

Nov. 29, 1943. Order No. 8, authorizing payment of Real Estate and Franchise taxes.

Nov. 29, 1943. Petition for order modifying injunction so as to permit Petitioner to terminate lease and notice thereon.

Dec. 4, 1943. Proof of Service of copy of Notice of Motion for order modifying injunction so as to permit petitioner to terminate lease and the annexed Petition.

Dec. 6, 1943. Motion for order modifying orders #1 & #5 so as to permit Hoboken Railroad Warehouse & Steamship Connecting Co. to terminate the lease between said Co. & Debtor dated 6/19/06 (cal.) Off to Dec. 20, 1943.

Dec. 7, 1943. Statement of operations and balance Sheet—Month of October 1943.

[fol. 3] Dec. 13, 1943. Petition for Instructions.

Dec. 13, 1943. Order No. 9 instructing Trustee Regarding employment of Independent Accountants.

Dec. 20, 1943. Motion for order modifying orders #1 & #5 so as to permit Hoboken R. R. Warehouse & Steamship Connecting Co. to terminate the lease between said Co. & Debtor dated 6/19/06 (cal.) Off 1 week.

Dec. 27, 1943. Motion for order modifying orders #1 & #5 so as to permit Hoboken R. R. Warehouse & Steamship Connecting Co. to terminate the lease between said Co. & Debtor dated 6/19/06 (cal.) Off to Jan. 10/44.

Dec. 29, 1943. Petition for Instructions of Forrest S. Smith Trustee, re: payment to employees.

Dec. 29, 1943. Order No. 10 instructing Trustee re: payments to employees of debtor.

Jan. 3, 1944. Petition for confirmation of Trustee's appointment of counsel.

Jan. 3, 1944. Order No. 11, confirming Trustee's appointment of Counsel.

Jan. 4, 1944. Petition for Instructions and Order No. 12, instructing Trustee regarding sum due to George A. Fuller Co. and Merritt-Chapman and Scott Corporation.

Jan. 5, 1944. Statement of Operations and Balance Sheet—Month of November 1943.

Jan. 10, 1944. Hearing on Motion for Order modifying Order #1 and #5 so as to permit Hoboken R. R. Ware- [fol. 4] house & Steamship Connecting Co. to terminate the lease between said company and debtor, dated 6/19/06, (cal.) Off to 2/14/44.

Jan. 20, 1944. Notice of Petition for Order extending the time for filing a Plan of Reorganization.

Jan. 20, 1944. Petition for Order extending Trustee's time to adopt executory contracts and for instructions on payment of use and occupation and Notice of Motion thereon, returnable 1/24/44.

Jan. 24, 1944. Hearing on Motion for Order extending time of Debtor to file Plan of Reorganization and Motion for order extending the Trustee's time to adopt or reject executory contracts and for instructions on payment of use and occupation (Cal.) Off one week.

Jan. 26, 1944. Petition for Instructions of Forrest S. Smith, Trustee, re: action he should take with respect to the United States' request for an agreement for indemnity and release.

Jan. 26, 1944. Order No. 13, instructing Trustee to execute and deliver a release and indemnity agreement etc.

Jan. 26, 1944. Order No. 14, continuing Trustee's Motion for an Order extending time on Executory Contracts, etc. and granting temporary extension of time.

Jan. 28, 1944. Petition and Order No. 15, relating to Employment of Counsel.

Jan. 28, 1944. Petition and Order No. 16, for instructions as to Appeal to U. S. Supreme Court in Civil No. 2092.

[fol. 5] Jan. 31, 1944. Hearing on Motion for Order extending time to Debtor to file Plan of Reorganization (Fake) (Cal.) Motion granted, extending time to 4 weeks.

Jan. 31, 1944. Hearing on Motion for order extending the Trustee's time to adopt or reject executory contracts and for instructions on payment of use and occupation, etc. (Fake) (cal.) Continued to 3/27/44.

Feb. 8, 1944. Notice of Motion on Petition for Order modifying injunction so as to permit petitioner to terminate lease.

Feb. 14, 1944. Statement of Operations and Balance Sheet for Month of December, 1943.

Feb. 14, 1944. Hearing on Motion for Order Modifying Orders #1 and #5 so as to permit Hoboken R. R. Warehouse & Steamship Connecting Co. to terminate the lease between said company and debtor dated 6/19/06 (cal.) Briefs to be filed. Decision Reserved (cal.) (Fake).

Feb. 14, 1944. Hearing on Trustee's motion on instruction for payment for use and occupation (Cal.) Off 1 week (Cal.) (Fake).

Feb. 14, 1944. Order No. 17, continuing Trustee's time to adopt or reject executory contracts and continuing Trustee's Motion to fix payment of use and occupation.

Feb. 17, 1944. Amended Income Statement.

Feb. 21, 1944. Hearing on Trustee's Motion on instruction for payment for use and occupation (cal.) Off to March 6 (Cal.).

Feb. 25, 1944. Petition and Order No. 18, permitting Trustee to employ Accountant Specially.

[fol. 6] Feb. 25, 1944. Petition and Order No. 19, fixing time within which the Claims of Creditors may be filed, etc.

Mar. 6, 1944. Trustee's Motion on Instruction for payment for use and occupation (Cal.) Off 2 weeks.

Mar. 6, 1944. Petition and Order No. 20, permitting Trustee to employ accountants specially.

Mar. 8, 1944. Statement of Operations and Balance Sheet for Month of January, 1944.

Mar. 9, 1944. Petition for Order Authorizing payment of retroactive Wage Increases to all of the debtor's employees & Notice of motion thereon returnable 3/13/44.

Mar. 13, 1944. Hearing on Motion for an Order authorizing payment of retroactive wage increase to all of the debtor's employees, etc. (cal.) (Fake) Motion granted.

Mar. 13, 1944. Order No. 21 authorizing payment of Retroactive Wage Increases.

Mar. 20, 1944. Hearing on Trustee's Motion on Instruction for Payment for Use & Occupation (cal.) (Fake) (Order is to be drawn providing for the payment of rent in accordance with the decision of the Court of Errors and Appeals).

Mar. 20, 1944. Order of Interstate Commerce Commission directing that Report of Bureau of Accounts concerning income of debtor from 3/1/32 to 5/31/43 to be filed and

made a part of the record therein, with Copy of Report referred to.

Mar. 23, 1944. Petition and Notice of Motion for an Order further extending Trustee's time to adopt or reject executory contracts, returnable 3/27/44.

[fol. 7] Mar. 24, 1944. Order No. 22, fixing reasonable value of the use and occupation of leased premises and directing payment thereof.

Mar. 27, 1944. Hearing on Motion for order extending the Trustee's time to adopt or reject executory *and* contracts and for instructions on payment of use and occupation, etc. (cal.) Off two weeks.

Mar. 30, 1944. Order No. 23, continuing Trustee's Motion for an Order further extending time on Executory Contracts, etc. and granting temporary extension of time.

Apr. 1, 1944. Statement of Operations and Balance Sheet for Month of February 1944.

Apr. 10, 1944. Hearing on Motion for Order extending the Trustee's time to adopt or reject executory contracts and for instructions on payment of use and occupation, etc. (cal.) Off to 6/1/44.

Apr. 10, 1944. Affidavit of Trustee as to why the time of adoption or rejection of executory contracts should be further continued at least until 9/25/44.

Apr. 13, 1944. Order No. 24 further extending Trustee's time to adopt or reject executory contracts.

Apr. 17, 1944. Trustee's Report of Publication and of mailing under Order No. 19 filed 2/25/44, determining and fixing the time and manner of filing claims.

Apr. 29, 1944. Statement of Operations and Balance Sheet for Month of March, 1944.

May 8, 1944. Copy of Proof of Claim of Collector of Internal Revenue in Amount of $532.16.

[fol. 8] May 15, 1944. Petition and Order No. 25, authorizing Trustee to compensate special accountants and approving filing of Monthly Report.

May 26, 1944. Petition and Notice of motion for an order authorizing Trustee to continue in force executory contracts and acknowledgments of service.

May 29, 1944. Hearing on Notice of motion for order authorizing trustee to continue in force executory contracts (cal.) (Fake) Off to 6/1/44.

May 29, 1944. Hearing on Notice of motion to authorize Trustee to compromise 1941 and 1942 income taxes (cal.) (Fake) Order to be signed (cal.).

May 29, 1944. Petition and Order No. 26, authorizing Trustee to compromise 1941 and 1942 income taxes (Fake).

May 31, 1944. Statement of Operations and Balance Sheet for month of April, 1944.

June 1, 1944. Hearing on Notice of Motion for order authorizing trustee to continue in force executory contracts (cal.) (Fake) off to 6/12/44.

June 9, 1944. Proof of Claim of the Baltimore & Ohio R. R. Co., et al. in amount of $2,380.74.

June 12, 1944. Proof of Claim of the Pennsylvania R. R. Co. in the amount of $2,129,400.00.

June 12, 1944. Hearing on Notice of Motion for Order authorizing Trustee to continue in force executory contracts (cal.) Ordered motion granted (Fake).

[fol. 9] June 12, 1944. Order No. 27 authorizing Trustee to continue in force executory contracts (Fake).

June 12, 1944. Stipulation of Facts.

June 13, 1944. Proof of Claim of Seatrain Line, Inc. for various amounts.

June 15, 1944. Proof of Claim of Hoboken Land and Improvement Co. in amount of $65,000.00 with interest from 4/1/40.

June 15, 1944. Proof of Claim of Hoboken R. R. Warehouse & Steamship Connecting Co. in the amount of $50,975.01, with interest.

June 22, 1944. Affidavit of Mailing, including copies of election instruments, comprising proof of Trustee's election to adopt executory contracts.

June 24, 1944. Statement of Operations and Balance Sheet for month of May, 1944.

July 13, 1944. Petition & Order No. 28 re: claims to Locomotive 601 returnable July 17, 1944.

July 17, 1944. Hearing on order to show cause on locomotive 601 (cal.) Continued 2 weeks.

July 17, 1944. Order No. 29 continuing Order to Show Cause (#28) re: locomotive 601 to 7/31/44 (Fake).

July 17, 1944. Affidavit of service of Order No. 28.

July 20, 1944. Copy of Amended Proof of Claim of Internal Revenue Service.

July 20, 1944. Notice of Motion & Petition for Order further extending debtor's time to file a Plan of Reorganization.

July 24, 1944. Motion for order for further extending debtors time to file Plan of Reorganization (cal) Continued 4 weeks.

[fol. 10] July 26, 1944. Statement of Operations & Balance Sheet Month of June 1944.

July 26, 1944. Order No. 29 further extending Debtor's time for filing Plan of Reorganization until 8/26/44.

July 31, 1944. Hearing on Order to Show Cause on Locomotive 601 (cal.) Continued one week.

Aug. 4, 1944. Opinion of Hon. Guy L. Fake, U. S. Dist. Judge, granting motion to terminate lease dated 6/19/06, between debtor and Hoboken R. R. Warehouse & Steamship Connecting Co. et al.

Aug. 7, 1944. Affidavit of Graham M. Brush, President of Seatrain Lines Inc., re: order No. 28 re: claims to Locomotive 601.

Aug. 7, 1944. Hearing on Order to Show Cause on Locomotive 601 (cal.) Ordered adjourned to 8/14/44 (Fake).

Aug. 9, 1944. Ordered No. 30 continuing hearing under Order 28 re: Locomotive 601 to 8/14/44 (Fake).

Aug. 10, 1944. Amendment of Proof of Claim of Seatrain Lines, Inc.

Aug. 11, 1944. Petition for an Order further extending Debtor's time for filing a Plan of Reorganization, with Notice of Motion thereon, returnable 8/14/44.

Aug. 14, 1944. Hearing on Motion for an Order further extending Debtor's time for filing a Plan of Reorganization (cal.) (Fake) Order signed.

Aug. 14, 1944. Order No. 31, further extending Debtor's time for filing a Plan of Reorganization to 2/24/45.

[fol. 11] Aug. 14, 1944. Hearing on Order to Show Cause on Locomotive 601 under Order No. 28 (cal.) (Fake) Ordered adjourned to 11/13/44 (Fake).

Aug. 14, 1944. Order No. 32 continuing hearing under Order 28 to 11/13/44 (Fake).

Aug. 17, 1944. Notice of Motion for Order terminating lease between Hoboken R. R. Warehouse & Steamship Connecting Co. & Hoboken Mfg. R. R. Co.

Aug. 21, 1944. Hearing on Notice of Motion for Order Terminating Lease (cal) Ordered adjourned to 8/28/44 (Fake).

Aug. 25, 1944. Affidavit of Edward J. O'Mara.

Aug. 28, 1944. Affidavit of Andrew R. MacGowan.

Aug. 28, 1944. Hearing on Notice of Motion for Order Terminating Lease (cal.) Ordered adjourned to 9/5/44.

Aug. 30, 1944. Notice of Motion on petition of Hoboken Land & Improvement Co. to Terminate Leases.

Sept. 2, 1944. Statement of Operations and balance sheet for July, 1944.

Sept. 5, 1944. Hearing on motion for order Terminating Lease, (Cal.) (Fake) Hearing continued—no date fixed.

Sept. 13, 1944. Notice of Motion to advance date of hearing on Order No. 28 re: claims to Locomotive 601.

Sept. 18, 1944. Hearing on Notice of Motion to advance date of hearing on Order No. 28 re: claims to Locomotive 601 (cal.) (Fake) Ordered continued two weeks (Fake).

[fol. 12] Sept. 25, 1944. Order #33 continuing hearing on Order No. 28 re: claims to locomotive No. 601.

Oct. 2, 1944. Ordered motion to advance date of hearing on Order No. 23 re: claims to locomotive 601 be advanced to 10/23/44 (Fake).

Oct. 4, 1944. Statement of Operations and balance sheet, Month of August 1944.

Oct. 6, 1944. Order No. 34 continuing hearings of Motions for order terminating leases (Fake).

Oct. 9, 1944. Order No. 35 re: Reclamation petition for Locomotive No. 601 (Fake).

Oct. 9, 1944. Order No. 36 advancing hearing on Order No. 28 re: claims to locomotive No. 601 (Fake).

Oct. 10, 1944. Certified copy of a certificate approved by the Commission relative to expenses incurred.

Oct. 23, 1944. Hearing on petition for reclamation for locomotive No. 601. Ordered issue in petition for reclamation be joined with issues in Trustee's Petition for Instructions (Fake).

Oct. 23, 1944. Ordered hearing on motion for terminating lease adjourned until 11/13/44 (Fake).

Oct. 23, 1944. Hearing on Order to Show Cause on Locomotive 601 under Order No. 28. Ordered issues in Trustee's petition for Instructions be joined with issues in Petition for Reclamation.

Oct. 23, 1944. Order No. 37 directing Trustee to pay cost of Report to I. C. C. (Fake).

[fol. 13] Oct. 23, 1944. Trustee's answer to petition.

Oct. 31, 1944. Statement of Operations and Balance Sheet Month of September 1944.

Oct. 31, 1944. Order No. 38 referring matters to Special Master, etc. (Fake).

Nov. 13, 1944. Hearing on motion for order terminating lease adjourned to 12/4/44 (Fk).

Nov. 14, 1944. Answer of Seatrain Lines Inc. to petition of Trustee re: Locomotive 601.

Dec. 1, 1944. Statement of Operations and Balance Sheet for Month of October 1944.

Dec. 4, 1944. Ordered hearing on motion for an order terminating lease adjourned to 12/11/44 (Fk).

Dec. 11, 1944. Ordered hearing on motion for an order terminating lease adjourned to 12/18/44 (Fake).

Dec. 18, 1944. Hearing on Motion for order terminating leases—Decision reserved (Fake).

Dec. 19, 1944. Order No. 39 Terminating Leases (Fake).

Dec. 21, 1944. Order No. 40 authorizing Trustee to pay Appeal costs on lease Termination Order out of Estate Funds (Fake).

Dec. 21, 1944. Order No. 41 instructing Trustee to pay 1944 real estate and franchise taxes (Fake).

Dec. 21, 1944. Order No. 42 instructing Trustee to make 1944 Bonus Payments (Fk).

Dec. 21, 1944. Notice of Appeal.

Dec. 22, 1944. Copy of Notice of Appeal sent to Wm. P. Rowland, Clerk of USCCA and to Wall, Haight, Carey & Hartpence.

[fol. 14] Dec. 26, 1944. Hearing on motion for a stay of the operation of Order No. 39 pending appeal—Ordered motion denied (Fake).

Dec. 26, 1944. Order No. 43 denying motion for stay (Fk).

Jan. 3, 1945. Affidavits of Serving notice, and copy of Order No. 39.

Jan. 5, 1945. Stipulation as to Record on Appeal.

Jan. 5, 1945. Statement of Operations and Balance Sheet—Month of November 1944.

[fol. 15] IN UNITED STATES DISTRICT COURT

PETITION

For an Order of Approval Under Section 205, Title 11, United States Code, and for Further Relief

To the Honorable Judges of the District Court of the United States for the District of New Jersey:

The petition of Hoboken Manufacturers Railroad Company, a railroad corporation organized and existing under the laws of the State of New Jersey, hereinafter referred to as the "Debtor", respectfully represents:

1. Debtor is a railroad corporation duly organized and existing under the laws of the State of New Jersey, is a citizen and resident of said State, and is a common carrier by railroad engaged in the transportation of property in interstate commerce, its operations in connection therewith being entirely within the State of New Jersey. It is not a street, suburban or interurban electric railway. During the six months period immediately preceding the filing of this petition the Debtor has had and now has its principal operating office in the City of Hoboken, State of New Jersey in the District of New Jersey.

2. The only railroad which Debtor operates is a switching railroad line along the waterfront of Hoboken, N. J., entirely within the State of New Jersey. Its line connecting on the north with the line of the Erie Railroad Company and through this connection and also through a float bridge, it interchanges freight with other trunk line railroads serving New York Harbor. As a common carrier by railroad, it is subject to the Interstate Commerce Act and files schedules of rates and files financial reports and accounts with the Interstate Commerce Commission pursuant to that Act.

3. The major part of Debtor's right of way and line of railroad is held by it under a lease dated June 19, 1906 for a term of 99 years from Hoboken Railroad Warehouse and Steamship Connecting Company hereinafter some-
[fol. 16] times referred to as the lessor. Other smaller parcels are held under leases of approximately the same date and term from Hoboken Land and Improvement Company.

4. Debtor owns three railroad locomotives and it has rented another locomotive from Seatrain Lines, Inc. Debtor owns no railroad freight cars but rents freight cars for the transportation of freight over its line from other railroads owning the same, paying to them rental or so-called per diem under contract through the Association of American Railroads.

5. Debtor has issued and outstanding 4,000 shares of common stock of a par value of $100. per share, all of said stock except directors' qualifying shares being owned by Seatrain Lines, Inc., a corporation organized under the laws of the State of Delaware.

6. Debtor has no outstanding bonds and no secured indebtedness.

7. (a) According to Debtor's latest balance sheet as of May 31, 1943, Debtor had current assets totaling $234,681.49, including cash of $133,130.77 and miscellaneous accounts receivable of $83,413.17. At the same time Debtor had total current liabilities of $316,770.60 of which amount $213,122.22 represented traffic and car service balances due to railroad connections of Debtor and owners of cars used by Debtor. On information and belief the relation of current liabilities to current assets is not materially different as of the date hereof.

(b) In addition to the aforesaid liabilities of Debtor as of May 31, 1943, Debtor was then and is now indebted to Seatrain Lines, Inc. in the amount of $100,000 represented by a past due note, dated January 11, 1937, and payable January 11, 1940.

8. The financial condition of Debtor is seriously aggravated by the following additional circumstances:

[fol. 17] (a) On or about July 2, 1943, judgment was entered against Debtor in the Court of Common Pleas of Hudson County, New Jersey, in the amount of $27,965.00 in a suit brought against it by its lessor, Hoboken Railroad Warehouse and Steamship Connecting Company. The circumstances of this suit were, briefly, as follows: The lease of June 19, 1906 referred to in paragraph 3 hereof provides that the rental to be paid by Debtor thereunder shall be the sum of several items, to wit: (1) a stated amount of $22,000 per year;

(2) certain amounts per ton of freight transported over the lines of Debtor subject to the lease and referred to as "tonnage rents"; (3) all premiums of insurance upon the leased premises, and (4) all taxes upon the demised premises or upon the lessor by reason of its ownership thereof and of the appurtenant franchises or upon the rent reserved by the lease which the lessee may be required to pay thereon or retain or deduct therefrom. For the first time in the history of the lease, the lessor in or about 1933 demanded that under the tax clause referred to Debtor should pay as part of the rent the Federal income taxes for which the lessor was liable. Debtor paid such taxes at first through oversight but subsequently refused to pay them. Lessor thereafter demanded that debtor as part of the rent should also pay the excess profits and capital stock taxes of the lessor. Lessor also demanded that Debtor pay rent on certain tonnage, which Debtor declined to do, believing the tonnage not within the terms of the lease. Upon Debtor's refusal to pay such taxes and excess tonnage amounts as additional rent, lessor demanded arbitration under a clause of the lease providing for arbitration in the event of dispute between the parties. Arbitration was thereupon had before three arbitrators. The arbitrators made an award against Debtor in the total amount claimed by lessor, namely, $24,102.43, one of the arbitrators dissenting on [fol. 18] the ground that the only questions before the arbitrators were questions of law, that the arbitrators intended to decide according to law and that pursuant to the law and in accordance with the terms of the lease Debtor was not obligated to pay the income, excess profits and capital stock taxes of the lessor nor was it called upon to include the tonnage in question in the total tonnage upon which rent was paid. Debtor thereupon instituted suit in the Court of Chancery of New Jersey, to set aside the award on the ground that the arbitrators intended and must have intended to decide according to law and that their decision was erroneous as a matter of law. At about the same time the lessor instituted a suit at law against Debtor in the Court of Common Pleas of Hudson County to enforce the arbitration award. The latter suit was stayed pending action upon Debtor's suit in the Court of Chancery.

The Vice Chancellor held against Debtor, ruling notwithstanding the statement to the contrary in the opinion of the dissenting arbitrator, that there was no indication that the arbitrators intended to decide according to law. On appeal this decision was affirmed by the New Jersey Court of Errors and Appeals. Thereafter the stay of the lessor's suit at law having been vacated, the aforesaid judgment in said suit was entered against Debtor in the amount of the arbitrator's award plus interest thereon.

(b) The foregoing suit related to rent for the fiscal years from June 30, 1932 to June 30, 1939, both inclusive. On or about March 31, 1943 said Lessor instituted a second action at law in the Court of Common Pleas of Hudson County, to recover from Debtor as additional rent for the fiscal years ending June 30, 1940, 1941 and 1942 the income, excess profits and capital stock taxes assessed against and paid by it in those years in the total amount of $13,162.89 and also a further sum of $1,403.55 computed by including in the [fol. 19] tonnage on which tonnage rents were computed freight similar to that which Debtor had previously believed not within the terms of the lease, the total amount sued for including interest being $14,566.44. This suit is pending.

(c) On information and belief Debtor's said lessor, Hoboken Railroad Warehouse and Steamship Connecting Company, has filed its income tax returns upon a cash basis. Consequently, upon the collection of the judgment for additional rent, representing the income, excess profits and capital stock taxes of said lessor and the additional tonnage rents, the sum so collected will constitute additional income to said lessor for the year in which it may be collected and thereupon further income and excess profits taxes will be due thereon, which under the lease as interpreted by the arbitrators and by the Court of Chancery, Debtor will be obligated to pay. Debtor believes that lessor's income is such that these additional taxes will be very substantial.

(d) Of the total of the additional rent claimed by Lessor represented by the judgment for $27,965.00 in the first suit and the amount of $14,566.44 demanded

in the second suit Debtor has accrued $39,498.12 as a contingent liability on its books and it is included in the balance sheet figures stated in paragraph 7 hereof.

(e) Included in the aforesaid liabilities of Debtor stated in paragraph (a) hereof is an amount of $188,059.92 due to the Pennsylvania Railroad Company, representing the difference between the sum of $209,046.90 for per diem or car rental on cars of the Pennsylvania Railroad Company which had been delivered to Debtor during the period between 1932 and May 31, 1943 and so-called switching reclaim due from Debtor to said Pennsylvania Railroad Company in the amount [fol. 20] of $20,986.98. Debtor had from time to time tendered payment of such per diem less switching reclaim to the Pennsylvania Railroad Company, the amount of such per diem owing and tendered by it being computed at the rate of $1.00 per day, the established per diem rate fixed by the Association of American Railroads and held reasonable by the Interstate Commerce Commission for all railroads. The Pennsylvania Railroad Company, however, from time to time has refused to accept payment from or make settlement with Debtor in accordance therewith and has instead claimed compensation for its cars at the rate of $10.00 per day, or ten times the established per diem rate, on such of its cars as were delivered by Debtor to the vessels of Seatrain Lines, Inc. Upon Debtor's refusal to pay such compensation, the Pennsylvania Railroad Company has brought two suits against Debtor and Seatrain Lines, Inc., which are pending in the United States District Court for the Southern District of New York, in which the total amounts claimed computed at the rate of $10.00 per car per day are $1,403,640 and $725,384.00, respectively. Debtor has asserted various counterclaims in these suits, including counterclaims for increased divisions as hereinafter more fully explained. These suits have not been brought to trial pending final adjudication of a proceeding pending in this Court, *The Pennsylvania Railroad Company et al. v. United States of America*, Civil 2092, brought by the Pennsylvania Railroad Company and others to set aside an order of the Interstate Commerce Commission determining $1.00 per day as

the just and reasonable compensation to be received by the Pennsylvania Railroad Company and others for their cars when delivered to vessels of Seatrain Lines, Inc., and requiring the Pennsylvania Railroad Company to consent to such delivery on the payment to it of such compensation.

[fol. 21] 9. Debtor has pending various claims, suits and counterclaims against several railroads for increased divisions of joint through rates claimed by Debtor to be due to it from them. These cannot be brought to a conclusion until a determination by the Interstate Commerce Commission of the just and reasonable divisions of joint rates to which Debtor is entitled from its connection. Complaint was filed by Debtor with the Interstate Commerce Commission in 1933 praying it to make such determination, but the Interstate Commerce Commission failed so to do and dismissed Debtor's complaint. This Court in a proceeding before it, *Hoboken Manufacturers Railroad Company v. United States of America*, Civil No. 1100 on or about December 3, 1942 entered a decree annulling and setting aside the Interstate Commerce Commission's order of dismissal and directing the Interstate Commerce Commission to reconsider its decision and reach a determination making a preliminary determination as to the reasonable compensation to be paid to Seatrain Lines, Inc. and included in the divisions of Debtor. The decision of this Court in said proceeding has been appealed to the Supreme Court of the United States, where the case is now pending, and therefore it does not seem probable that the final determination of Debtor's claim can be had for a long period of time and certainly not in time to enable Debtor to secure the benefits thereof, if any, for the purposes of meeting its current liabilities above described.

10. Debtor has no means of borrowing or otherwise procuring funds to meet the aforesaid obligations now owing by it or as they hereafter mature. Debtor's estimated cash resources are wholly insufficient to meet Debtor's financial requirements, including necessary working capital, so that the Debtor is without funds to continue to operate its railroad and property and maintain the same in condition and repair to render adequate service to the public and at the same time to meet its debts, including the aforesaid lia-

bilities and obligations as they mature. Debtor therefore [fol. 22] desires to effect a plan of reorganization pursuant to Section 77, Chapter 8 of the Acts of Congress relating to bankruptcy, U. S. C., Title 11, Section 205.

11. A copy of this petition is this day being filed with the Interstate Commerce Commission.

12. The filing of this petition was duly authorized by the Debtor by resolution of its Board of Directors adopted at a meeting thereof duly held on the 21st day of July, 1943.

Wherefore, your Debtor prays that an order may be entered approving this action as properly filed under Section 77 and that it may be granted all other and further relief to which it may be entitled.

Hoboken Manufacturers Railroad Company, by Joseph Hodgson, Vice-President. (Corporate Seal.)

J. B. Cossolini, Asst. Secretary.

Collins & Corbin, by Edward A. Markley, a Member of Said Firm, Attorneys for Debtor, 1 Exchange Place, Jersey City, N. J.

Parker McCollester, 25 Broadway, New York, N. Y., Of Counsel.

[fol. 23] *Duly sworn to by Joseph H. Hodgson. Jurat omitted in printing.*

In United States District Court

Order

Approving Petition, Continuing Debtor in Possession, Directing Filing of Schedules, Staying Interferences With Debtor's Property, and Fixing Hearing for Appointment of Trustees

Upon due consideration of the petition of Hoboken Manufacturers Railroad Company, the above-named Debtor, filed herein this day and the Court being satisfied that such peti-

tion complies with Section 205 of Title 11 of the United States Code and has been filed in good faith:

It is on this 26th day of July, 1943, on motion of Edward A. Markley and Parker McCollester, of counsel for said debtor, ordered:

[fol. 24] 1. Said petition be, and it hereby is, approved as properly filed under said Section 205 of Title 11 of the United States Code.

2. The Debtor shall be, and it hereby is, authorized and directed, pending further order of this Court in the premises, to run, manage, operate, maintain, preserve and keep in proper condition and repair the railroad and properties, including leased railroads and property, of the Debtor wherever situated, whether in this state, judicial district, or elsewhere; to manage, operate and conduct its business, and to this end to exercise its authority rights and franchises and to discharge all public duties obligatory upon it; to employ and discharge and fix the compensation of, all officers, agents, employees and counsel; to collect and receive the income, rents, revenues, tolls, issues and profits accrued or to accrue from its railroad and properties, to collect all outstanding interline and other accounts owing to the Debtor and all dividends and interest on securities belonging to it; to sell, convey or lease property of the Debtor, real or personal, not needed in the operation of its railroad to the extent necessary to protect or preserve its railroad, or properties or business, or as may be ordered by this Court, to make additions, betterments and improvements thereto and thereof; to perform its existing contracts made in the regular course of business to the extent that performance thereof may seem desirable, but such performance shall not constitute an affirmance of said contracts or any thereof; to enter into and perform other contracts in the regular course of the conduct of its business; all to the end that the business of the Debtor may be continued, operated and managed according to the customary and usual manner of conducting the same, and all of the foregoing powers to be exercised by the Debtor according to law and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein.

[fol. 25] 3. The Debtor is authorized in its discretion from time to time, until the further order of this Court, out of

funds now in its possession or hereafter coming into its hands, to pay:

A. All taxes, assessments and other governmental charges now due or hereafter coming due upon or measured by, the properties, pay-rolls, income, franchises or business of the Debtor; *provided, however*, that the Debtor shall make no payment on account of taxes, assessments or other governmental charges, State or local, due or to become due, and whether heretofore or hereafter assessed, upon its properties or any thereof in the State of New Jersey without the further order of this Court;

B. All other current expenses and costs hereafter necessarily incurred in operating, maintaining and preserving its railroad and other properties, collecting the revenues, and conducting the business of the Debtor, whether or not chargeable to operating expenses under applicable accounting rules; including, without limitation, all wages, salaries and compensation of officers, agents, employees and counsel employed or retained by the Debtor, all interline accounts and balances owing by Debtor, including amounts in respect of revenues from freight, traffic interchanged with other carriers, and charges for repairs of, or loss or damage to, rolling stock and equipment interchanged with other carriers, all claims for injuries, death or other loss or damage arising from the operation of its railroad and properties, and all claims for loss, damage or delay to freight and all claims for overcharges and for reparation, and all accounts for services, materials and supplies rendered or furnished to the Debtor, whether chargeable in the first instance to expenses, or otherwise; and including also rent due under any lease or contract for rental of right of way, railway [fol. 26] equipment or other property but not including, unless otherwise ordered by this Court, any portion of rental claimed by any lessor under any lease which represents income taxes, excess profits taxes or capital stock taxes of the lessor and not including, unless so ordered by this Court, any rental based upon volume of freight transported by railroad when such freight has already been once included in the tonnage upon which rent is computed or when such freight is

not actually handled by Railroad as a common carrier, *provided*, that any of the foregoing accounts and claims may, in the discretion of the Debtor, either be paid in full or adjusted or compromised;

C. All amounts hereafter coming due, whether as rent, car hire, *per diem*, mileage or otherwise, in respect of the use or possession by the Debtor of locomotives, cars and other rolling stock and equipment, including the principal of, and interest or dividends on, equipment obligations issued, guaranteed or assumed by the debtor; and all amounts (other than in respect of property taxes payable to the State of New Jersey or any municipality or other taxing authority of said State), hereafter coming due under any lease, joint facility contract, or other contract or arrangement, for or in respect of the occupation or use by the Debtor, whether solely or jointly, of lines of railroad, terminals, docks, piers, tracks, buildings, depots, side-tracks, yards, warehouses, shops, bridges, interlocking plants and other railroad property and facilities and including also rent due under any lease or contract for rental of right of way, railway equipment or other property but not including, unless otherwise ordered by this Court, any portion of rental claimed by any lessor under any lease which represents income taxes, excess profits taxes or capital stock taxes of the lessor and not including, unless so ordered by this Court, any rental based upon volume of freight [fol. 27] transported by railroad when such freight has already been once included in the tonnage upon which rent is computed or when such freight is not actually handled by Railroad as a common carrier; *provided however* that no such payment or payments shall constitute an affirmation or adoption of said leases, joint facility contracts or other contracts or arrangements, or any of them;

D. All liabilities and costs hereafter coming due in respect of the construction or acquisition of property or work heretofore authorized and actually initiated or contracted for by the Debtor and constituting additions, betterments or improvements of any railroad property of or used by the Debtor; but, without further order of this Court, no expenditure shall be made for any acquisition, construction or work con-

stituting an addition, betterment or improvement, not heretofore authorized and actually initiated or contracted for by the Debtor, except for additions, betterments and improvements necessarily incident to the current maintenance and preservation of the Debtor's railroad and properties;

E. All claims, liabilities and costs of the characters specified in the foregoing paragraphs B, C and D of this order incurred by the Debtor and coming due within six months preceding the date of this order in the usual and customary operation of its railroad and properties and the conduct of its business; *provided, however*, that no payment shall, without the further order of this Court, be made under this paragraph E in respect of any additions, betterments and improvements not necessarily incident to the current maintenance and preservation of the Debtor's property, and *provided, further*, that no liability or cost coming due more than six months preceding the date of this order shall be paid by the Debtor without the further order of this Court and *provided, further*, that without [fol. 28] further order of this Court no payment shall be made of any judgment against the debtor entered preceding the date of this order in any proceeding to enforce a claim by a lessor for additional rent under any lease or to enforce an award by arbitrators representing additional rent claimed under any lease to the extent that such judgment or such additional rent represents of is based upon income, excess profits or capital stock taxes of, paid by or assessed against the lessor or excess tonnage rents of the character referred to in B and C hereof or interest thereon; except as provided in paragraphs A and F of this order;

F. All outstanding checks or vouchers for wages, salaries or other compensation for services, regardless of when issued; and all claims preferred under Section 205(n) of Title 11 of the United States Code, regardless of when accrued or of the time of presentation or assertion thereof, but any such claims may be paid in full, or adjusted or compromised by the Debtor, in its discretion;

G. The cost of maintaining the corporate existence of the Debtor, including corporate, franchise, stamp and similar taxes, such office rent as may be required,

and the necessary expense of keeping and preserving its corporate records, of maintaining offices and agencies for transferring and registering its stock and bonds, and the proper charges and expenses of trustees under indentures or mortgages pursuant to which securities of, or assumed or guaranteed by, the Debtor have been issued, but not including the payment of fees to directors for attending meetings of the Board of Directors or Executive or other committees of the Debtor;

H. Allowances in amounts not greater than those heretofore allowed and paid by the Debtor, to superannuated employees and employees who have become disabled or incapacitated in the Debtor's service, and who are receiving such allowances at the date of this order; [fol. 29]

I. Court costs and costs incurred before various State and Federal Commissions or other administrative boards or tribunals; and

J. The expense of printing pleadings, motions, petitions, orders and other documents now on file or hereafter filed in this proceeding, reasonably necessary to be printed, in such quantity as shall provide copies for the use of the Court, the Interstate Commerce Commission, the Debtor, parties to the cause and such others as may have any interest therein, such expense to be taxed as costs in this proceeding.

Until further order of this Court no payment shall be made by the Debtor upon or in respect of the principal of its note dated January 11, 1937 to Seatrain Lines, Inc., nor of car rental or *per diem* due to the Pennsylvania Railroad Company and accruing prior to six months preceding the date of this order, nor of any claim of the Pennsylvania Railroad Company for additional damages or compensation in connection with its cars delivered to and in the possession of Debtor prior to six months preceding the date hereof.

4. The Debtor shall have the power to elect whether to adopt or continue in force, or to refuse to adopt or continue in force or to disaffirm or reject, any lease, trackage, terminal, crossing or operating agreement, or other contract not fully performed to which it is a party or under

which it may be obligated; and the Debtor, or the trustee or trustees hereafter appointed and qualified, shall be allowed a period of six months (or such further period as this Court may allow) from the date of the entry of this order to make such election. Such elections may be made [fol. 30] from time to time, and any such election shall be made by instrument in writing, signed by the duly authorized officer or officers of the Debtor, or by such trustees of the property of the Debtor as may hereafter be appointed and qualify, and delivered, or mailed by registered mail, postage prepaid, addressed to the other party or parties to said lease, agreement or contract; and any such election shall be effective when a copy of such instrument, together with proof of delivery or mailing of a copy or copies thereof as aforesaid to the other party or parties to such lease, agreement or contract shall be filed of record in this proceeding. No occupancy, conduct or user of property or rights by the Debtor, or payments made by the Debtor as rent or otherwise or accepted by it as rent or otherwise, or any other acts or omissions by the Debtor during said period (or such other period as this Court may allow), except an instrument filed and delivered or mailed as aforesaid expressly electing to adopt any such lease, agreement or contract shall be deemed to preclude or conclude the Debtor in respect of such election or be deemed to constitute an election to adopt or continue in force any such lease, agreement or contract. In case payments are made pursuant to the foregoing authority contained in Subdivision C of paragraph 3 hereof and any such leases, agreements or contracts shall be subsequently adopted by the Debtor, or such trustee or trustees of the property of the Debtor, as may hereafter be appointed and qualify, or pursuant to a plan of reorganization, said payments shall be deemed to have been made on account of the rental due from the Debtor under such leases, agreements or contracts. In case any such lease, agreement or contract shall be disaffirmed or rejected by the Debtor, or by such trustee or trustees, or under a plan of reorganization, the operation of the leased or used properties shall be deemed to have been, and such payments to have been made, for the account of the lessors or owners, respectively, and such payments shall be recovered, set off, or made and charged, on [fol. 31] the earnings or properties, or both, of the respective lessor or owner, as the case may be, prior to any mort-

gage or other lien thereon, by such method as the Court shall determine; and all rights and equities of the parties arising from such payments shall be reserved for later determination.

5. Pending further order of the Court in the premises, the Debtor is authorized and empowered to institute or prosecute in any court or before any tribunal of competent jurisdiction all such suits and proceedings as may be necessary in its judgment for the recovery or proper protection of its property or rights, and to liquidate, compromise, adjust or make settlement, by written agreement or consent judgment or otherwise, of any thereof; and likewise to defend and to liquidate, compromise, adjust or make settlement of any actions, proceedings or suits now pending against the Debtor or which may hereafter be asserted or be brought in any court or before any officer, department, commission or tribunal to which the Debtor is or shall be a party; but no payment shall, without further order of this Court, be made by the Debtor in respect of any such actions, proceedings or suits on claims accruing prior to the date of this order, except such claims as may be permitted to be paid by this order or by other general orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action taken by the Debtor in defense or settlement of such claims, actions, proceedings or suits shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the Debtor that otherwise would not exist.

6. The Debtor shall close its present books of account as of the close of business on July 26th, 1943, and shall open new books of account as of the opening of business on July 27th, 1943, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and [fol. 32] disbursements of the Debtor, and shall preserve proper vouchers for all payments made by the Debtor, and shall deposit the monies coming into its hands in the banks in which funds of the Debtor are presently deposited, or such thereof as shall be selected by the Debtor, or in such other bank or banks as shall be selected by the Debtor and approved by this Court.

7. Not later than September 10, 1943, unless the time be extended by further order of this Court, the Debtor

shall file with the Clerk of this Court a statement of the assets and liabilities of the Debtor as of the close of business on July 26th, 1943, and within 45 days after the close of each calendar month thereafter shall file with said Clerk a statement of the assets and liabilities of the Debtor as of the close of business on the last day of such calendar month, together with a summary statement of the revenues and expenses of the Debtor, for such calendar month. All such statements shall be certified as correct by the chief accounting officer of the Debtor. The officers of the Debtor are hereby directed within 45 days from the date of the entry of this order (unless a later date be directed by this Court on cause shown) to prepare and file with the Clerk of this Court (a) a list of all known creditors of the Debtor and the amounts and character of their debts, claims and securities and the last known post-office address or place of business of each bondholder and creditor and (b) a list of all known stockholders of the Debtor with the last known post-office address or place of business of each. The contents of such lists shall not constitute admissions by the Debtor or any trustee of the estate in this proceeding or otherwise. Such lists shall be open to the inspection of any creditor or stockholder of, or claimant against, the Debtor during reasonable business hours upon application to the Debtor or any such trustee.

8. All persons, including all persons acting or claiming to act as officials or otherwise on behalf of any state, county, [fol. 33] municipality or other taxing authority except the United States, and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order of this Court and from commencing or continuing any suits against the

Debtor, and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, *provided* that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction, and *provided*, further, that the title of any owner, whether as trustee or otherwise, to rolling stock and equipment leased or conditionally sold to the Debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this order.

9. The Debtor hereby is directed to give notice by mailing a copy of this order to the creditors of Debtor whose addresses are known to it, and to cause a notice, directed to its creditors and stockholders, to be published within five days from the date of the entry of this order, once in The Jersey Journal, a newspaper published in the City of Jersey City in the State of New Jersey, and in New York Times, a newspaper published in New York City, of a hearing to be [fol. 34] held on August 23rd, 1943 at 10:30 o'clock A. M., in the Court Room occupied by this Court in the United States Court House, Post Office Building, at Newark, in the State of New Jersey, at which hearing or any adjournment thereof this Court will appoint one or more trustees of the Debtor's property. The notice of such hearing shall be substantially in the form of the notice annexed hereto, made a part hereof and designated "Exhibit A". When such mailing and publication have been completed the Debtor shall file with the Clerk of this Court its sworn report with respect thereto.

10. This Court reserves full right and jurisdiction to make, from time to time, such orders as the Court shall deem proper limiting the time within which suits against the Debtor may be brought, staying any suits now pending or hereafter brought against the Debtor, appointing a trustee or trustees of all of said Debtor's property and estate, with all the title and powers of such trustee or trustees under and subject to the provisions of the Acts of Congress relating to bankruptcy, including the power to operate the business of the Debtor, fixing the time within which any plan of reorganization shall be proposed, accepted and con-

firmed, requiring the Debtor to file such schedules and submit such information as may be necessary to disclose the conduct of the Debtor's affairs and the fairness of any proposed plan, fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and interests and, in general, such orders amplifying, extending, supplementing, limiting or otherwise modifying this order as to the Court may at any time seem proper.

Guy L. Fake, U. S. District Judge.

[fol. 35] EXHIBIT "A" TO ORDER

Notice to All Creditors and Stockholders of Hoboken Manufacturers Railroad Company.

Pursuant to an order entered July 26th, 1943 by the Honorable Guy L. Fake, Judge of the District Court of the United States for the District of New Jersey, notice is hereby given that a hearing will be held on August 23rd, 1943, at 10:30 o'clock A. M., by said Judge in the Court Room usually occupied by him in the United States Court House, Post Office Building, in the City of Newark, New Jersey, at which hearing or any adjournment thereof said Judge will, pursuant to the provisions of Section 205 of Title 11 of the United States Code relating to bankruptcy, appoint one or more trustees of the property of said Hoboken Manufacturers Railroad Company.

Dated, July 26th, 1943.

IN UNITED STATES DISTRICT COURT

ORDER NO. 5 APPOINTING TRUSTEE

It appearing from the report of the debtor and the affidavits thereto attached that the debtor gave notice of a hearing to be held before me on August 23, 1943 at 10:30 o'clock A. M. in the matter of the appointment of one or more trustees of the debtor's property, as directed by this Court in its Order No. 1, dated July 26, 1943, and hearing having been had at the time fixed and counsel for the inter-

ested parties having been heard and the hearing having been continued by order of this Court until September 13, 1943 and thereafter by order of this Court having been further continued until October 11, 1943 and such adjourned hearing having been had and counsel for the interested parties having been heard and it being the opinion of the Court that the appointment of one trustee will best serve the interests of all parties, it is on this 11th day of October, 1943, Ordered:

[fol. 36] 1. That Forrest S. Smith, of Shrewsbury, N. J., with an office at 1 Exchange Place, Jersey City, N. J., be and he hereby is appointed trustee of the debtor's property.

2. That the bond of the said trustee be and it hereby is fixed at Fifty Thousand Dollars ($50,000.), conditioned upon his well and truly performing the duties of trustee of debtor's property and duly accounting for any monies and property which may come into his hands and abiding by and performing all things which he shall be directed by the Court to do.

3. That this appointment shall become effective upon ratification thereof by the Interstate Commerce Commission.

4. That said trustee shall within ten (10) days after such ratification execute and file with this Court a bond in the amount and with the conditions specified in paragraph 2 hereof, with sureties approved by the Judge of this Court for the benefit of whom it may concern.

5. That following said ratification by the Interstate Commerce Commission and upon the filing of such bond, said trustee shall have all the title and shall exercise, subject to the control of this Court and consistently with the provisions of Section 77 of the Bankruptcy Act (U. S. C. Title 11, Section 205), all of the powers of a trustee appointed pursuant to Section 44 of said Act or of any other section of said Act and to the extent not inconsistent with said Section 77 the powers of a receiver in an equity proceeding and subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor.

6. That following said ratification and upon filing such bond, all of the property, real, personal and mixed of every kind and nature whatsoever of the debtor shall by this [fol. 37] order be vested in said Forrest S. Smith as trustee of the debtor's property.

7. That following said ratification and upon filing such bond, said trustee shall have all of the rights, privileges, powers and duties heretofore granted to or imposed upon the debtor pursuant to Order No. 1 of this Court in this proceeding, dated July 26, 1943, and all orders supplementary thereto and amendatory thereof and each and all of the orders heretofore entered in this proceeding shall with respect to said trustee and the property of the debtor be of like force and effect as though said trustee were therein specifically named in the place of the debtor, all of said orders being incorporated in and made a part of this order by reference.

8. That following said ratification and upon filing such bond, said trustee shall by this order have authority and power to designate employees of the debtor to execute and deliver in his stead and as his agent checks, drafts, vouchers, orders, contracts, deeds, leases, and any and all instruments of every kind and nature whatsoever incident to the operation of the property of the debtor and such instruments so executed by the agents of said trustee shall bind such trustee as fully as though his signature had been affixed thereto.

9. That this Court reserves full right and jurisdiction to make from time to time such additional orders herein as the Court may deem proper as well as any orders amending, extending, limiting, modifying or otherwise changing this order, including the provisions of Order No. 1 and any orders supplementary thereto which are by reference incorporated in and made a part of this order, and in all respects to regulate and control the conduct of said trustee in the possession, control and operation of the property of the debtor.

10. That the Clerk of this Court forthwith transmit to the Interstate Commerce Commission, Washington, D. C., a [fol. 38] certified copy of this order and a copy of the stenographic minutes of the said adjourned hearing of October 11, 1943 to the end that said Interstate Commerce

Commission may determine upon the ratification of the appointment hereby designated and may at its convenience file with the Court its determination herein.

Guy L. Fake, United States District Judge.

ORDER OF INTERSTATE COMMERCE COMMISSION

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 4th day of November, A. D. 1943.

Finance Docket No. 14291

Hoboken Manufacturers Railroad Company Reorganization

The Commission having under consideration the application of Forrest S. Smith, filed October 28, 1943, for ratification of his appointment as Trustee of the property of the Hoboken Manufacturers Railroad Company, debtor, and for an Order fixing a maximum limit of his compensation as such trustee, in proceedings pending in the United States District Court for the District of New Jersey, for reorganization of the debtor's railroad pursuant to the provisions of Section 77 of the Bankruptcy Act, 11 U. S. C. A. sec. 205; and

It appearing, That by order of the court entered October 11, 1943, the said Forrest S. Smith was, without objection, appointed trustee of the debtor's property, subject to ratification by this Commission; and

It further appearing, That Forrest S. Smith has not been an officer, director, or employee of the debtor, or of any subsidiary corporation or holding company connected [fol. 39] therewith, within one year prior to the date of his appointment as trustee;

It is ordered, That the appointment of Forrest S. Smith, as trustee of the property of the debtor, be, and it is hereby, ratified; and

It is further ordered, That beginning as of the date when he shall have qualified as trustee and his appointment shall have become effective, compensation at the maximum rate of $5,000 a year to be paid to the said Forrest S. Smith, as trustee of the property of the debtor, be, and it is hereby, approved as reasonable, *provided, however*, that while he serves as such trustee he shall receive no salary or compensation for his services as an officer, director, or employee of

the debtor or any of its affiliated corporations, and that his only compensation from the estate of the debtor shall be that allowed to him as trustee by the judge within the maximum limit herein approved by this Commission as reasonable.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 40] In United States District Court

Notice of Motion

To James D. Carpenter, Jr., Esq., Attorney for Forrest S. Smith, Trustee; Messrs. Collins & Corbin, Esqs., Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc.; John A. Hartpence, Esq., Attorney for Pennsylvania Railroad Company:

Please Take Notice that on Monday, February 14, 1944, at ten-thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall move before the United States District Court for the District of New Jersey, at the Courtroom, Post Office Building, City of Newark, New Jersey, for an Order modifying Orders No. 1 and 5 made in this proceeding by the said United States District Court, so as to permit Hoboken Railroad Warehouse and Steamship Connecting Company to terminate the lease between said company and the Debtor herein, dated June 19, 1906, in accordance with the prayer of the annexed Petition.

Yours, etc., Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Railroad Warehouse and Steamship Connecting Company.

Dated: February 7, 1944.

[fol. 41] In United States District Court

Petition for Order Modifying Injunction so as to Permit Petitioner to Terminate Lease

To the Honorable, the Judges of the United States District Court for the District of New Jersey:

The petition of Hoboken Railroad Warehouse and Steamship Connecting Company, a corporation organized and

existing under the laws of the State of New Jersey, hereinafter referred to as the "petitioner" respectfully shows:

1. By indenture of lease dated June 19, 1906, petitioner leased to debtor:

> All and singular the line of railroad of the Lessor in the County of Hudson, in the State of New Jersey, extending from a point in the township of Weehawken in the County of Hudson and State of New Jersey, where said line of railroad of the Lessor connects with the tracks of the Erie Railroad Company, thence southerly over private property to and across the boundary line between said township of Weehawken and the City of Hoboken, and thence southerly and easterly through said City of Hoboken over private property to the southerly line of Fourteenth Street, produced, at its intersection with Hudson Street, thence southerly along Hudson Street to a point north of the southerly line of Eleventh Street, thence southerly and along Hudson Street on a curve easterly to the easterly house line of Hudson Street, thence easterly and southerly over private property to a point in the southerly line of Fifth Street east of the easterly house line of River Street, thence southerly and along the paved roadway along the water front parallel with River Street to the northerly line of Fourth Street; and any other lines of railroad, including branch lines, owned at the time of the execution and delivery of this indenture by the [fol. 42] Lessor and shown on the map hereto annexed; all rights of way, station and terminal grounds and other lands and interests in lands; all roadbed, trestles, viaducts, super-structures, poles, wires, tracks, rails, ties, freight-houses, water-stations, and tanks, turntables, engine-houses, car and machine shops, yards and terminals; all rolling stock and equipment of every description, including locomotive and other engines and cars; all tools, implements and machinery, and all trackage and operating contracts;
>
> Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest property, possession, claim and demand what-

soever, as well in law as in equity, of the Lessor, of, in and to the same and every part and parcel thereof, with the appurtenances.

For a period of ninety-nine years from the date of said lease.

2. Article Third, paragraph (1) of said lease provides:

"The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, nor without like consent expressed as aforesaid, mortgage the interest of the Lessee in the demised premises, save (1) to raise moneys for use exclusively for the improvement and betterment of the demised premises and to an amount not exceeding the actual cost of such improvements and betterments or (2) for the purpose of defraying the cost of the construction by the Lessee, in [fol. 43] accordance with the provisions of Article Ninth of this indenture, of an elevated or sub-surface railroad upon the demised premises and to an amount not exceeding the actual cost of such construction. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided."

3. Article Fifth of said lease provides:

"It is mutually covenanted as follows:

The Lessee shall and will, at the determination of this lease, redeliver and surrender up to the Lessor the demised premises in good order and condition, with

such additions, alterations and improvements as shall have been made thereto.

If the Lessee (1) shall, at any time or times hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of thirty days, or (2) shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements hereof, and such default shall continue for the space of thirty days after notice from the Lessor of such default, and requiring the Lessee to remedy the same, then and in either of such cases, the Lessor may at any time, either

(a) proceed by proper action or actions in the proper courts, either at law or in equity, to enforce perform-[fol. 44] ance of such covenants by the Lessee or to recover damages for the breach thereof; or

(b) by notice in writing, terminate this lease, and thereupon enter into and upon the demised premises, and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its assigns, to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the Lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made; but the Lessor shall, nevertheless, have the right to recover from the Lessee any and all amounts which, under the terms hereof, may be then due and unpaid for the use of the demised premises."

4. By Order No. 5 made herein on October 11, 1943, Forrest S. Smith was appointed Trustee of the debtor's property, said appointment to become effective upon ratification thereof by the Interstate Commerce Commission. Said Order provided that following such ratification by the Interstate Commerce Commission, and upon the filing of a bond by the Trustee in conformity with the Order,

"said trustee shall have all the title and shall exercise, subject to the control of this Court and consistently with the provisions of Section 77 of the Bankruptcy Act (U. S. C. Title 11, Section 205), all of the powers of a trustee appointed pursuant to Section 44

of said Act or of any other section of said Act and to the extent not inconsistent with said Section 77 the powers of a receiver in an equity proceeding and subject to the control of this Court and the jurisdiction of the Interstate Commerce Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor."

The appointment of said Forrest S. Smith as Trustee of the debtor's property was duly ratified by the Interstate [fol. 45] Commerce Commission, and on November 12, 1943, said Forrest S. Smith executed and filed the bond provided for in said Order No. 5 and entered upon his duties as such Trustee.

5. Paragraph 6 of said Order No. 5 made herein on October 11, 1943, provides:

"That following said ratification and upon filing such bond, all of the property, real, personal and mixed of every kind and nature whatsoever of the debtor shall by this order be vested in said Forrest S. Smith as Trustee of the debtor's property."

6. Petitioner alleges that by reason of the premises and by reason of the qualification of the said Forrest S. Smith as Trustee of the debtor's property herein, and of the terms and provisions of said Order No. 5, and of the provisions of Section 77 of the Bankruptcy Act (U. S. C. Title 11, Section 205), the interest of the debtor in the aforesaid lease, and its rights and privileges thereunder, have been transferred to the said Trustee in a proceeding to which the lessee is a party, and the rights, duties and obligations of said lessee have thereby been transferred, encumbered, abrogated and altered, without the previous consent of the lessor expressed by endorsement on the lease made in pursuance of authority granted by resolution of the Board of Directors of the lessor, contrary to the provision of Article Third, paragraph (1) of said lease.

7. On January 5, 1944, petitioner gave notice to the debtor by registered mail of debtor's default under the covenant and agreement contained in Article Third, paragraph (1) of said lease, and requiring the debtor to remedy

the said default. A copy of said notice, marked Exhibit "A", is annexed hereto.

8. Petitioner desires to avail itself of its right to terminate the lease and enter upon the demised premises, in the manner prescribed in said lease, but is advised by coun-
[fol. 46] sel and believes that by the terms of Order No. 1 of this court in this proceeding, dated July 26, 1943, and by the terms of Order No. 5 made by this court in this proceeding, on the 11th day of October, 1943, it is restrained and enjoined from doing so.

Wherefore your petitioner prays that an order may be made, modifying the aforesaid Order No. 1 and Order No. 5, made by this court in this proceeding, so as to permit the petitioner to serve written notice upon the debtor of the termination of the aforesaid lease, in accordance with the terms thereof, and to forthwith enter into and upon the demised premises and henceforth hold, possess and enjoy the same, free from any right of the trustee or debtor or its assigns.

Hoboken Railroad Warehouse and Steamship Connecting Company, by John J. McGirl, Petitioner.
Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Attorneys for Petitioner.

Duly sworn to by John J. McGirl. Jurat omitted in printing.

[fol. 47] EXHIBIT "A" TO PETITION

January 5, 1944.

To Hoboken Manufacturers' Railroad Company.

SIRS:

Please Take Notice that the appointment and qualification of Forrest S. Smith as Trustee of the property of Hoboken Manufacturers' Railroad Company and the consequent transfer of the lease dated June 19, 1906, between said Hoboken Manufacturers' Railroad Company and the undersigned, and of the rights and privileges thereby granted, to the said Trustee, and the consequent transfer, encumbrance, abrogation and alteration of the rights, duties

and obligations of the lessee thereunder, constitute a default under the covenant and agreement contained in Article Third paragraph (1) of said lease, and you are required to remedy said default.

Hoboken Railroad Warehouse and Steamship Connecting Company, by Kelley Graham, Prest.

Service of a copy of the within Notice of Motion and annexed Petition is hereby acknowledged this 7th day of February, 1944.

James D. Carpenter, Jr., Attorney for Forrest S. Smith, Trustee; Collins & Corbin, Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc.

[fol. 48] IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER AUTHORIZING TRUSTEE TO CONTINUE IN FORCE EXECUTORY CONTRACTS

To the Honorable Judges of the United States District Court for the District of New Jersey:

Forrest S. Smith, the duly qualified and acting Trustee of the property of the above named Debtor, respectfully shows that:

1. By his petition verified March 21, 1944, and filed herein your petitioner prayed that an order might be entered further enlarging and extending the period within which he, as Trustee, might elect whether to adopt or to continue in force, or to refuse to adopt or to continue in force, or to disaffirm or reject any lease, trackage, terminal, crossing, or operating agreement, or other contract not fully performed to which the above named Debtor was a party or under which it was obligated as of July 26, 1943, when the original petition for reorganization herein was filed, to and including September 25, 1944.

2. By Order No. 24 entered herein on April 13, 1944, after argument of the aforesaid petition on April 10, 1944, this Honorable Court further enlarged and extended the period within which your petitioner, as Trustee, might elect whether to so adopt or reject such executory contracts to June 1, 1944.

3. Many of the uncertainties and circumstances which prompted petitioner to seek the above mentioned and prior extensions of time to accept or reject executory contracts herein are still not resolved. Such uncertainties are set forth at length in the petitions filed in these proceedings by your petitioner and verified by him on January 19, 1944, and March 21, 1944, as well as in petitioner's affidavit executed on April 7, 1944. On April 24, 1944, the Supreme Court of the United States ordered the parties to the pending appeals Nos. 845 and 846 concerning interchange of [fol. 49] freight cars by certain railroad companies with Seatrain Lines, Inc., to show cause why the causes should not be dismissed as moot. After submission of briefs the court, on May 8, 1944, dismissed the rule to show cause and noted probable jurisdiction. In petitioner's opinion, no plan for reorganization of the Debtor can satisfactorily be formulated until final disposition of this question by the Supreme Court.

4. In view of the foregoing uncertainties, your petitioner cannot now determine whether it ultimately will be for the benefit of the Debtor's estate and its creditors to presently adopt or reject the various executory contracts. Furthermore, after carefully investigating and studying the question as to whether such contracts should be adopted or rejected, your petitioner cannot now say that it will be for the benefit of the said Debtor's estate to presently reject same. Petitioner is advised by his counsel and believes that rejected executory contracts cannot be included in a plan of reorganization, whereas those which are presently adopted may later be reviewed to determine whether they should be included in or excluded from a plan of reorganization. It is your petitioner's opinion that he and the Debtor should have an opportunity to determine whether or not to include the various executory contracts to which the Debtor is a party or under which it is obligated in a plan of reorganization and, therefore, your petitioner is of the opinion and recommends to this court that such executory contracts should be continued in force pending the formulation and adoption of a plan of reorganization herein.

Wherefore, your petitioner prays that an order may be entered authorizing and directing him to adopt or to continue in force any lease, trackage, terminal, crossing or

operating agreement, or other contract not fully performed to which the Debtor is a party or under which it may be obligated as of July 26, 1943, and to make such elections [fol. 50] pursuant to the provisions of paragraph 4 of Order No. 1 entered herein on said last date.

Forrest S. Smith, Trustee.

Duly sworn to by Forrest S. Smith. Jurat omitted in printing:

Service of the within Petition and Notice of Motion is hereby acknowledged this 23rd day of May, 1944.

Collins & Corbin, Attorneys for Hoboken Manufacturers' Railroad Company, Debtor, and Seatrain Lines, Inc.; Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Railroad Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company; John A. Hartpence, Attorney for Pennsylvania Railroad Company.

[fol. 51] IN UNITED STATES DISTRICT COURT

ORDER NO. 27 AUTHORIZING TRUSTEE TO CONTINUE IN FORCE EXECUTORY CONTRACTS

Forrest S. Smith, the Trustee of the property of the above named Debtor, having filed his petition for an order authorizing him to continue in force executory contracts together with a duly served notice of motion thereon returnable Monday, May 29, 1944, before this court, and the matter being continued on said date to June 1, 1944, when it was further continued and said Trustee's time to adopt or reject executory contracts was further extended to June 12, 1944; and on said last date the matter being opened to the court by James D. Carpenter, Jr., attorney for said Trustee, in the presence of Edward J. O'Mara, of Wall, Haight, Carey & Hartpence, attorneys for Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, Parker McCollester appearing for Collins & Corbin, attorneys for said Debtor and Seatrain Lines, Inc., and John A. Hartpence, attorney for Pennsylvania Railroad Company, and the court having taken

testimony, heard the arguments of counsel thereon and good cause appearing for entry of this order;

Now, Therefore, it is on this 12th day of June, 1944, on motion of James D. Carpenter, Jr., attorney for said Trustee,

Ordered that said Trustee be and he hereby is authorized and directed to adopt and continue in force any and all leases, trackage, terminal, crossing or operating agreements, or other contracts not fully performed to which the Debtor was a party or under which if may have been obligated as of July 26, 1943, the date on which Order No. 1 approving the petition for reorganization was entered herein, and it is

Further *Ordered that the right to enter its objections* to the foregoing provision of this order and to move for [fol. 52] modification of same within ten days from the date hereof is hereby reserved to Pennsylvania Railroad Company.

Guy L. Fake, United States District Judge.

In United States District Court

Notice of Trustee's Election to Adopt Executory Contracts

To Hoboken Railroad Warehouse and Steamship Connecting Company, 1 Newark Street, Hoboken, New Jersey, and Wall, Haight, Carey & Hartpence, Its Attorneys, 15 Exchange Place, Jersey City 2, N. J.:

Re: Leases and agreements as follows:

1. Lease Hoboken Railroad Warehouse and Steamship Connecting Company to Hoboken Manufacturers Railroad Company dated June 19th, 1906, including Supplement No. 1 thereto dated November 16th, 1920.

2. Modification to main lease dated the 19th day of June, 1907, between Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company.

3. Agreement—American Warehouse and Trading Company, Hoboken Railroad Warehouse and Steamship Connecting Company, Hoboken Land and Improve-

ment Company, had the Hoboken Manufacturers Railroad Company, dated June 19, 1906.

4. Amendment to agreement American Warehouse and Trading Company, Hoboken Railroad Warehouse and Steamship Connecting Company, Hoboken Land and Improvement Company, and Hoboken Manufac-
[fol. 53] turers Railroad Company, dated the 19th day of June, 1907.

5. Agreement American Warehouse and Trading Company, Hoboken Railroad Warehouse and Steamship Connecting Company, Hoboken Land and Improvement Company, and Hoboken Manufacturers Railroad Company, dated June 20th, 1910.

6. Agreement Hoboken Manufacturers Railroad Company, Seatrain Lines, Inc., Hoboken Terminal Properties, Inc., and Hoboken Land and Improvement Company, dated the 8th day of December, 1932.

GENTLEMEN:

This is to notify you that pursuant to Order No. 27 entered in the above entitled proceedings on June 12, 1944, the undersigned, Trustee of the property of the above named Debtor, has elected not to reject but to adopt and continue in force the above indicated executory contracts and agreements between you and said Debtor.

Forrest S. Smith, Trustee.

IN UNITED STATES DISTRICT COURT

NOTICE OF TRUSTEE'S ELECTION TO ADOPT EXECUTORY CONTRACTS

To Hoboken Land & Improvement Company, 1 Newark Street, Hoboken, New Jersey, and Wall, Haight, Carey & Hartpence, its attorneys, 15 Exchange Place, Jersey City 2, N. J.

Re: Leases and agreements as follows:

1. Lease Hoboken Land and Improvement Company to Hoboken Manufacturers Railroad Company, dated the 19th day of June, 1906 (Plot A).

[fol. 54] 2. Lease Hoboken Land and Improvement Company to Hoboken Manufacturers Railroad Company, dated the 19th day of June, 1906 (Plot B).

3. Agreement between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company to tie leases of Plots A and B to termination of the main lease, dated the 19th day of January, 1915.

4. Agreement between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company to amend rental of Plot A, dated the 26th day of February, 1929.

5. Agreement between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company to amend rental of Plot B, dated the 26th day of February, 1929.

6. Agreement between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company for land for siding to Ellerman's Wilson Line Pier, dated the 1st day of June, 1921.

GENTLEMEN:

This is to notify you that pursuant to Order No. 27 entered in the above entitled proceedings on June 12, 1944; the undersigned, Trustee of the property of the above named Debtor, has elected not to reject but to adopt and continue in force the above indicated executory contracts and agreements between you and said Debtor.

Forrest S. Smith, Trustee.

[fol. 55] IN UNITED STATES DISTRICT COURT

Appearances: *Messrs. Carpenter, Gilmour & Dwyer, By James D. Carpenter, Jr., Esq.*, and *Charles B. Collins, Esq.*, Attorneys for Trustee; *Messrs Collins & Corbin, By Edward A. Markley, Esq.*, Attorneys for Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc.; *Messrs. Wall, Haight, Carey & Hartpence, By Edward J. O'Mara, Esq.*, Attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company.

OPINION—Filed August 4, 1944

FAKE, District Judge:

This is a Railroad Reorganization Proceeding under Title 11 U. S. C. A. Section 205.

The present issues arise on a motion to permit the lessor to terminate a ninety-nine year railroad lease executed June 19, 1906, on the ground of a breach of the terms of the lease. The clause relied upon by the lessor, insofar as pertinent, reads as follows:

> "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner [fol. 56] altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided."

It is urged that upon the qualification of the trustee herein he acquired such an interest in the lease as to constitute a breach or violation of the conditions above quoted.

It will be noted that this clause is not worded in the exact language found in the usual bankruptcy forfeiture clauses nor is it worded as are the general run of the forfeiture clauses directed against assignment without the consent of the lessor. Here a default is contemplated not only if any sale or transfer of the demised premises is made by the lessee without the authorization of the lessor, but also if a transfer is brought about by any proceeding at law or in equity wherein the lessee is a party, whereby any of the duties of the lessee may be "encumbered, abrogated or in any manner altered."

Jones on Landlord and Tenant, Section 466, is cited with apparent approval in Gazlay v. Williams, 210 U. S.

41. That section reads as follows: "an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, *but the covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.*" And that text so approved is now given the strength of statutory sanction by Title 11 U. S. C. A. Sec. 110b, wherein it is enacted that "*an express covenant that an assignment by operation of law* or the bankruptcy of a specified party thereto or of either party *shall terminate the lease or give the other party an election to terminate the same shall be enforceable.*"

Title 11 U. S. C. A. Section 205(c)(2) provides that "The trustee * * * shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72, or any other section of this title, and, to the extent not inconsistent with this sec- [fol. 57] tion, * * *." This means that title vests in the trustee in a railroad reorganization proceeding to the same extent that it vests in a trustee in a general bankruptcy proceeding. As to the latter the United States Supreme Court held in Isaacs, Trustee v. Hobbs Tie & Timber Co., 282 U. S. 734, that "all property owned and possessed by the bankrupt vests in the trustee." These last quoted words are so clear as to require no further attempts at elucidation. The language "all property owned and possessed by the bankrupt" does not except leases because they may happen to carry a burden with them. They may be abandoned. They do vest however in the trustee.

Turning now to Section 110(b) of Title 11, it is found, with relation to unexpired leases of real property, that the trustee is allowed 60 days, (or an extended period) after adjudication to assume or reject such leases. This is to say, in the instant case, the title of the debtor-lessee became vested in the trustee subject to being divested by a rejection. This should be read in connection with Title 11 U. S. C. A. 110(a) which enacts that the trustee is "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition."

The case of Palmer v. Palmer, 104 Fed. 2nd. 161, is relied on by the debtor-lessee for the proposition that, "A lease, being property cum onere, does not pass to a trustee

in bankruptcy, unless he adopts it. * * *" "Yet" (says Judge Learned Hand in the opinion) "if the question were to arise for the first time, it would be a little hard to see by what power the court could keep a trustee in possession while he was determining his course, without compelling him meanwhile to fulfill the conditions imposed upon the term * * * * * * insolvency ought not to give the lessee's creditors greater rights to possession than the lessee himself enjoyed; * * *. This necessity should be in no sense affected by the fact that the property may be a railroad, * * *. The question does not concern the public, but is a dispute between two groups having interests [fol. 58] in the property * * *". The judge then says: "Nevertheless, the contrary has been generally held; * * *". The foregoing quotations are extracted from the opinion in the Palmer case, because they disclose the individual views of one whose opinions are held in the highest esteem and they seem to indicate a reluctance on his part to follow the law as he found it. This reluctancy however was dissipated in the rule of stare decisis as he found it in his circuit based upon In re Frazin, 183 Fed. 28 (1910). No case of like tenor has been found in this circuit or in the case law of New Jersey. This court therefore is free to approach the problem raised as one of first instance.

The lease contains a further clause providing that in the event of a breach of covenant and the lapse of thirty days after notice of termination given by the lessor, the lessor may enter. The notice so provided has been served and thirty days have elapsed.

The first question to be disposed of here is: Did the debtor-lessee have any property in the lease at the time it filed its petition herein? The answer is, Yes. It had a leasehold subject to forfeiture on notice in the event of a transfer of the leasehold by operation of law in any proceeding wherein the lessee might be a party. Nothing else appearing, that estate is the specific estate which the trustee herein took upon his qualification.

The second and final question is: Did the passing of such title to the trustee constitute a breach of the terms of the lease entitling the lessor to re-enter pursuant to notice as in the lease provided? Here again the answer is, Yes.

A reading of the clause under consideration discloses that the character or quality of that which is contemplated

as passing by operation of law must be such as would transfer, encumber, abrogate or alter any of the rights, duties or obligations of the lessee.

The transfer, here by operation of law, has placed the trustee in possession and he is quite a different occupant than the lessee named in the lease. Moreover when the [fol. 59] trustee took, the result of his taking was to abrogate and alter the terms of the lease by reason of Section 1100(b) of Title 11 of the Act, which in effect reads a sixty day period into the lease without the lessor's consent, within which time an adoption or rejection may take place. Surely this would force a different contract on the parties than that into which they each entered with their eyes open. Such a result cannot be justified either by the statutory law, the case law in this circuit, or on the basis of sound reason.

It appears that the trustee herein petitioned the court for leave to adopt the lease while the instant motion was pending and the prayer of the petition was granted. It is argued from this that such adoption resulted in the transfer of the title of the lease in breach of the terms of the lease. By reason of the conclusions above arrived at, I deem it not necessary to pass upon the issue thus raised other than to say that since the debtor-lessee's title passed to the trustee prior to the adoption, nothing was gained or lost by the adoption insofar as present issues are involved.

The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the law relating to the continuous operation of the railroad have been complied with.

[fol. 60] In United States District Court

Notice of Motion

To James D. Carpenter, Jr., Esq., Attorney for Trustee, Messrs. Collins and Corbin and Parker McCollester, Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc.

Sirs:

Please Take Notice that on Tuesday, September 5, 1944 at ten o'clock in the forenoon, or as soon thereafter as

counsel can be heard, we shall move before the United States District Court for the District of New Jersey, at the courtroom in the Post Office Building, City of Newark, New Jersey, for an order terminating two certain leases dated June 19, 1906, by and between Hoboken Land and Improvement Company, Petitioner, and Hoboken Manufacturers Railroad Company, Debtor, known respectively as Plot A Lease and Plot B Lease, in accordance with the prayer of the annexed Petition.

Yours, etc., Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Land and Improvement Company, Petitioner.

Dated: August 29, 1944.

[fol. 61] In United States District Court

Petition of Hoboken Land and Improvement Company to Terminate Leases

To the Honorable the Judges of the United States District Court for the District of New Jersey:

The petition of Hoboken Land and Improvement Company, a corporation organized and existing under the laws of the State of New Jersey, hereinafter referred to as the Petitioner, respectfully shows:

1. By Indenture of Lease dated June 19, 1906, Petitioner leased to Debtor all that certain lot, tract or parcel of land and premises, situate, lying and being in the City of Hoboken, County of Hudson and State of New Jersey, and particularly described as follows:

"Beginning at a point in what would be the westerly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ten (210) feet northerly from the southerly line of Fourteenth Street and running thence (1) westerly and parallel to the southerly line of Fourteenth Street four hundred and seventy (470) feet to a point in what would be the easterly line of Bloomfield Street if Bloomfield Street were extended northerly; thence (2) northerly along what would be the easterly line of Bloomfield Street if so extended, one

hundred and fifty (150) feet to a point; thence (3) easterly and parallel to the southerly line of Fourteenth Street one hundred and seventy-seven (177) feet; thence (4) in a southerly direction one hundred and sixty-nine and eighty-nine hundredths (169.89) feet to a tangent point distant three hundred and nineteen and eighty-six hundredths (319.86) feet northerly at right angles from the southerly line of Fourteenth Street and one hundred and twenty-seven and ninety-two hundredths (127.92) feet westerly at right angles from the westerly line of Hudson Street extended northerly; thence (5) curving to the right with a radius [fol. 62] of two hundred and twenty-four and sixty-five Hundredths (224.65) feet one hundred and fifty-six and eighty-eight hundredths (156.88) feet to a point in the westerly line of Hudson Street extended northerly distant two hundred and thirty-four and sixty-four hundredths (234.64) feet northerly from the southerly line of Fourteen Street; thence (6) southerly along the westerly line of Hudson Street extended northerly twenty-four and sixty-four hundredths (24.64) feet to the point or place of beginning. Containing fifty-eight thousand one hundred and thirty-three (58,133) square feet more or less."

Said premises is known as and will hereafter be referred to as Plot A.

2. By Indenture of Lease dated June 19, 1906, Petitioner also leased to Debtor all that certain lot, tract or parcel of land and lands under water in the City of Hoboken, County of Hudson, New Jersey, with the pier, railroad trestle and other structures erected thereon, described as follows:

"Beginning at a point in what would be the easterly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ninety (290) feet northerly from what would be the southerly line of Fourteenth Street if Fourteenth Street were extended easterly and running thence (1) northerly along what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (2) easterly and parallel to the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet; thence (3) southerly and parallel to what

would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (4) westerly and parallel to what would be the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet to the point or place of be- [fol. 63] ginning. Containing ninety-four thousand three hundred and fifty (94,350) square feet more or less."

Said premises is known as and will hereafter be referred to as Plot B.

3. By Indenture dated the 19th day of January, 1905, by and between Petitioner and Debtor, wherein was recited the making of the aforesaid leases of Plot A and Plot B (referred to in said Indenture as the Leases), the simultaneous execution and delivery by Hoboken Railroad Warehouse and Steamship Connecting Company to the Debtor of the lease of a certain line of railroad (hereafter referred to as the Railroad Lease), the ownership by Petitioner of practically the entire capital stock of Hoboken Railroad Warehouse and Steamship Connecting Company and the fact that the leases were executed and delivered by the Petitioner and accepted by the Debtor in contemplation of the execution and delivery of the Railroad Lease, and that it was the intention of the Petitioner and of the Debtor that the Leases should be dependent upon the Railroad Lease and that any breach of any of the covenants or conditions of the Railroad Lease should be deemed a breach of the covenants or conditions of the Leases respectively, and that on the accrual of a right of entry under the Railroad Lease, a right of entry should likewise accrue under the Leases respectively, it was agreed that each of the Leases should be dependent upon the Railroad Lease, and that each of the Leases if not theretofore terminated should terminate at the expiration of the term of the Railroad Lease or the earlier termination, for any cause or in any manner whatever, of the Railroad Lease. It was further agreed by said Indenture that any breach of any covenant or condition of the Railroad Lease should be deemed a breach of the covenants or conditions of the Leases respectively, and on the accrual of a right of entry under the Railroad Lease a right of entry should likewise accrue under each of the Leases respectively.

[fol. 64] 4. Your Petitioner has been advised that on or about the 7th day of February, 1944, Hoboken Railroad Warehouse and Steamship Connecting Company filed its Petition herein, alleging the breach of a covenant of the aforesaid Railroad Lease by and between it and the Debtor, and praying for an order permitting it to terminate said Lease by reason of said breach, and that thereafter such proceedings were had on said Petition that this Court by its opinion filed herein on or about August 4, 1944, determined that the motion to terminate said Railroad Lease should be granted, to take effect upon the production to the Court of conclusive evidence that the requirements of the laws relating to the continuous operation of the Railroad have been complied with, and that a motion for the entry of an order in conformity with the aforesaid opinion of the Court is now pending herein.

Wherefore, your Petitioner prays that simultaneously with the entry of an order terminating the aforesaid Railroad Lease, an order may be made, terminating the aforesaid Leases to Plot A and Plot B and directing the Trustee herein to peaceably and quietly release, surrender and yield unto your Petitioner, its successors and assigns, all and singular, the said demised premises in accordance with the terms of the aforesaid Indenture dated January 19, 1915.

And your Petitioner will ever pray, etc.

Hoboken Land and Improvement Company, by John J. McGirl, Petitioner; Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Attorneys for Petitioner.

[fol. 65] *Duly sworn to by John J. McGirl; Jurat omitted in printing.*

[fol. 66] LESSOR EXHIBIT No. 1

Interstate Commerce Commission

Finance Docket No. 14693

Hoboken Railroad, Warehouse and Steamship Connecting Company Operation

Submitted October 28, 1944. Decided December 2, 1944

Application of the Hoboken Rail Road, Ware House and Steamship Connecting Company for Authority to Repossess and Operate a Line of Railroad in Hudson County, New Jersey, Dismissed. Held Not Within the Purview of Section 1 (18) of the Interstate Commerce Act

John J. Hickey and Walter W. Ahrens for applicant.

Edward A. Markley, Frank J. Clark, James D. Carpenter, Jr., and Charles B. Collins for intervenors.

REPORT OF THE COMMISSION

Division 4, Commissioners Porter, Mahaffie, and Miller by Division 4

The Hoboken Rail Road, Ware House and Steamship Connecting Company on September 4, 1944, applied under section 1 (18) of the Interstate Commerce Act for a certificate of public convenience and necessity authorizing it upon the termination of an existing lease to repossess and operate a line of railroad and appurtenant facilities which it owns but which at present are being operated by Forrest S. Smith, trustee in reorganization proceedings of the Hoboken Manufacturers Railroad Company, lessee, consisting of approximately 1.679 miles of main line and 7.766 miles of branch line or a total of 9.445 miles of track, all in Hudson County, New Jersey.

The line in question was constructed pursuant to a charter granted the applicant by the State of New Jersey on September 17, 1895, authorizing it to construct and operate [fol. 67] certain lines of railroad in Hudson County, and on October 23, 1895, the applicant obtained a franchise from the city of Hoboken permitting it to lay tracks on and operate over certain public streets in that city. The railroad was placed in operation by the applicant on September 7, 1897,

and it continued the operation thereof until June 19, 1906, when, by an agreement as of that date it leased, for a period of 99 years, the railroad, with all facilities, rolling stock, and operating rights to the Hoboken Manufacturers Railroad Company, hereinafter sometimes called the lessee company. The latter thereupon began operation of the property and, except for the 10-year period from July 1, 1917 to July 1, 1927, when the line was operated by the United States War Department, continued such operation until on or about July 26, 1943. On the latter date the lessee company filed in the United States District Court for the District of New Jersey a petition for reorganization under section 77 of the Bankruptcy Act, which petition was allowed as of the same date. The properties since have been operated under direction of the court. The appointment of Forrest S. Smith, as trustee, was approved by us in our order of November 4, 1943, *Hoboken Manufacturers Railroad Company Reorganization*, Finance Docket No. 14291; and he qualified for the position on November 12, 1943.

After the bankruptcy petition was allowed the applicant herein, as lessor of the properties, filed a motion with the court for a termination of the lease of June 19, 1906, on the ground that the reorganization proceedings breached certain terms of the lease agreement. Upon consideration of the premises the court on August 4, 1944, rendered its decision on the motion, *In the Matter of Hoboken Manufacturers Railroad Company, Debtor*, Opinion No. 48732, in which it held, among other things, as follows:

> "The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with."

[fol. 68] In order to satisfy the court the applicant as owner of the railroad properties has filed its application to resume operation thereof but it challenges our jurisdiction in the premises on the ground that the resumption of operation of its own properties, after temporary suspension thereof during the existence of the lease, is not within the purview of section 1 (18) of the act. We are asked, therefore, to find that we have no jurisdiction, and dismiss the application.

After the application was filed the lessee company and the Seatrain Lines, Inc., the latter being the owner of the capital stock of the former, jointly, and Forrest S. Smith as trustee of the lessee company, separately, filed petitions for leave to intervene in which were included requests for a hearing on the merits, for a finding that the resumption of operation by the applicant is within the provisions of section 1 (18) of the act, and for a suspension of the proceedings before us pending final decision on an appeal from the findings of the court that the lease of the properties was terminated by the reorganization proceedings. Upon consideration of these petitions and replies thereto by the applicant, on September 28, 1944, we entered an order herein permitting the petitioners to intervene, and providing for the filing of briefs by all parties on the sole question of the need for a certificate of public convenience and necessity under section 1 (18) of the Interstate Commerce Act to enable the applicant to operate its own property. Pursuant thereto briefs and reply briefs have been filed by the applicant and each of the interveners, except that counsel for the trustee has informed us by letter that no reply brief will be filed on the trustee's behalf.

Under the circumstances described our consideration herein is directed entirely to the question of our jurisdiction in the premises.

The applicant contends that our jurisdiction does not attach because the operation proposed is not over an additional or extended line of railroad within the meaning of [fol. 69] section 1 (18) of the Interstate Commerce Act, but is a mere continuance of the operation previously performed by it, and neither its responsibility for the continued operation of the property nor its operating rights thereover have ceased inasmuch as the lease agreement of June 19, 1906, specifically provided for the prospective reversion and subsequent direct operation by it of the properties involved; that when it obtained a charter and municipal grants from the State and city authorities it thereby incurred a continuing obligation to make provision at all time for the operation of its properties and to furnish reasonably sufficient transportation service thereon, and in the event of the termination of a lease thereof to resume operation for its own account; and that the obligations thus assumed are in no manner affected by the subsequent enactment of section 1

(18). It states further that this primary duty of the owner lessor to resume operation of its railroad properties is emphasized in section 205 (c) (6) of the Bankruptcy Act which provides:

> "(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of the period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49."

The interveners argue that the portion of the Bankruptcy Act cited proves the contrary of the applicant's contention because if a lease is rejected by the trustee of the debtor the lessor is authorized to operate the property [fol. 70] unless it shall appear that such operation "would be impracticable and contrary to the public interest" in which event it becomes "the duty of the lessee to continue operation on or for the account of the lessor" until we authorize the abandonment of the line. Under such circumstances they say the applicant herein should not be permitted to operate the property owned by it until it has shown in an open hearing, that such operation will not be impracticable or contrary to the public interest; and that likewise the trustee should not be permitted to turn the property over to the applicant until he has been issued a certificate authorizing him to abandon operation. While expressing the view that the question here presented is a novel one for which no precise precedent seems to exist, they assert that the provisions of section 1 (18) plainly prohibit the operation of "any line of railroad" or the abandonment of operation thereof without a certificate of public convenience and necessity first having been obtained from us.

The principal contention of the interveners is that upon termination of the lease the applicant will not become possessed of all the properties now in the hands of and

operated by the debtor trustee, and therefore will be unable to serve the public adequately. In support thereof they refer to certain testimony given before the court by an officer of the lessee company to the effect that the latter during its tenancy acquired title to and owns various tracts of land on which are located appurtenant facilities consisting of an engine house, offices, yards, sidetracks, and certain tracks extending to and serving the waterfront. They also state that Seatrains, Inc., claims title to one of the three locomotives which are used in connection with and are necessary for the continued operation of the properties, and that if this claim were upheld by the court the ability of the applicant to serve the public would be further diminished. According to them about all the property that would revert to the applicant without question upon the termination of the lease is its main tracks. On the con- [fol. 71] trary the latter asserts that the percentage of the total property in dispute is inconsequential.

In the above connection it is the applicant's contention that under the terms of the lease the title to all additions, betterments, and extensions of the properties in the hands of the lessee company passed to the lessor at the time of making or upon the installation thereof. While the interveners concede that appropriate provisions to that effect are contained in the lease they assert that the question is complicated by the fact that the applicant on June 29, 1927, executed certain indentures wherein it released the lessee company from any claims that it might be entitled to make under the lease as to certain of the properties, and that the question also must be determined as to whether the claim of title by the applicant to the additions and betterments, if otherwise valid, is superior to other creditors who are parties to the reorganization proceedings involving the lessee company. With respect to the releases mentioned the applicant states that it expects to present before the court having jurisdiction of the proceedings a widely different version from that advanced by the interveners. However, it argues that these matters are already properly in issue before the court and will be decided there, and that the final disposition thereof cannot effect our determination of the question as to whether the applicant must secure a certificate from us before it may resume operation of the properties with which it will again become possessed upon the termination of the lease.

In cases previously before us we have recognized the continuing obligation of an owner-lessor railroad company for the operation of its leased properties. In *Lehigh Valley R. Co. Abandonment of Operations*, 202 I. C. C. 659, we had before us applications by the lessee to abandon operation of the property owned by the State Line & Sullivan Railroad Company, and by the latter, as lessor, to abandon the property itself. Jurisdiction was taken of both applications and both were denied on their merits but a con- [fol. 72] tention by the lessor that inasmuch as it ceased to be an operating unit when the lease was consummated and had not since engaged in interstate commerce, it was, therefore, not subject to our jurisdiction, was rejected. On page 663, after showing the corporate history of the company, we said:

> "The subsequent lease of its railroad to another company did not change the lessor's relations to the public, nor relieve it from performance of the duties and obligations imposed by its charter or the general laws of the State, *Washington, A. & G. R. Co. v. Brown*, 17 Wall. 445, and these duties and obligations are not to be cast aside at will. In *Charles Wolff Packing Co. v. Court of Ind. Relations*, 262 U. S. 522, 543, the Supreme Court said that

> > A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous losses (citing cases), it may give up its franchise and enterprise, but short of this, it must continue.

> It follows that the State Line is, and will continue to be, primarily responsible for the performance of its duty to serve the public, unless and until it is duly relieved therefrom according to law, or some other arrangement is made for the operation of its line."

In *Norfolk S. R. Co. Receivers Abandonment*, 221 I. C. C. 258, we assumed jurisdiction and granted the application of the receivers of the Norfolk Southern to abandon operation, under lease, of a line of railroad owned by the Atlantic & North Carolina Railroad Company extending from Goldsboro to Moorehead, N. C., but declined jurisdiction and dismissed the application of the latter for au-

thority as the owner and lessor of the line involved to resume operation thereof. At page 269 we said:

> [fol. 73]. "The record clearly shows that the Atlantic Company as owner of the Atlantic Line, was under obligations to operate it in default of operation by the Norfolk Southern and that when the latter surrendered possession of the Atlantic line, the Atlantic Company had no alternative except to operate it."

Our recent expression in *Livestock Terminal Service Co. Abandonment*, 257 I. C. C. 1, decided May 19, 1944, is particularly pertinent to the issue here involved. At page 7 thereof we said:

> "The Stockyards Company did not begin operation of loading and unloading service under a certificate of public convenience and necessity. Its operation began long prior to the enactment of section 1 (18-20) of the act. But, in the performance of the service for many years, it incurred the relationship and duty to the public of a common carrier by railroad subject to the act. This relationship is not terminated by a lease of carrier facilities to another for performance of the service and, if the lease is terminated, the lessor itself must resume operation and perform its duty to the public until legally relieved of that obligation (citing cases)."

See also *Milwaukee Livestock Handling Company et al. Control*, 257 I. C. C. —, Finance Docket No. 14642, decided October 21, 1944. In the latter case we referred to the fact that a recent review of the authorities on the subject is contained in *Los Angeles & S. L. R. Co. v. Umbaugh*, 123 P. 2nd 224. That decision by the Supreme Court of Nevada holds that a lessee railroad company is the agent of a lessor company in the discharge of the charter powers of the latter.

The sense of our decisions, as well as those of the courts, seems to be that a lessor company by operation of law immediately, and without respect to its own desires in [fol. 74] the matter, becomes responsible for the operation of railroad properties owned by it upon the termination of a lease thereof. No certificate from us is needed because the lessor's obligations and duties to the public have never

ceased but have merely been performed by the lessee for its benefit, and when the latter for any reason no longer can perform such obligations the duties must be performed by the lessor on its own behalf. Were this not so, when a long-term lease expired the lessor might contend that having withdrawn as an operating carrier in interstate commerce it had no responsibility for any further operation of the properties, and if it were required to obtain a certificate before resuming operation might decline to make application therefor and avoid any efforts to force it to résume operation on the ground that it was not required to do so unless it obtained a certificate.

We are not convinced that it is our duty herein to consider what practical effect the termination of the lease will have upon the operation of the properties, and in view of our conclusions it would be inappropriate for us to do so. Such matters are properly before the court and, before entering a final decree it no doubt will give them careful consideration. In any event the applicant will be under the impelling duty to operate whatever properties may revert to it under the court's order. Our only concern herein is to determine whether the applicant is precluded from resuming operation of such properties unless it obtains a certificate of public convenience and necessity under section 1 (18) of the Interstate Commerce Act. Our conclusion is that the proposal herein is not within the purview of that section. If and when the lease is terminated and the property reverts to the applicant it will have no alternative but to resume operation thereof.

An appropriate order will be entered dismissing the application.

[fol. 75] At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 2nd day of December, A. D. 1944.

Finance Docket No. 14623

Hoboken Rail Road, Ware House and Steamship Connecting Company Operation

Order

Investigation of the matters and things involved in this proceeding having been made, briefs having been filed, and said division having, on the date hereof, made and filed a

report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the application of The Hoboken Rail Road, Ware House and Steamship Connecting Company in the above entitled proceeding, be, and it is hereby, dismissed.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

A true copy: W. P. Bartel, Secretary of the Interstate Commerce Commission.

[fol. 76] IN UNITED STATES DISTRICT COURT

ORDER NO. 39 TERMINATING LEASES

This matter coming before the court upon the petition of Hoboken Railroad, Warehouse and Steamship Connecting Company for an order permitting the petitioner to serve written notice upon the debtor of the termination of the lease by and between petitioner and debtor, dated June 19, 1906, and to forthwith enter into and upon the demised premises and henceforth hold, possess and enjoy the same free from any right of the trustee or debtor, and the petition of Hoboken Land and Improvement Company for an order terminating the leases of certain lots, tracts or parcels of land and lands under water in the City of Hoboken, Hudson County, New Jersey, known respectively as Plot A and Plot B, and more particularly described in the aforesaid petition of said Hoboken Land and Improvement Company, and the court having heard the arguments of Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, attorneys for petitioners, and James D. Carpenter, Jr., by Charles B. Collins, attorney for trustee, and Collins and Corbin, by Charles Broadhurst, attorneys for and of counsel with the debtor and Seatrain Lines, Inc., and having read the briefs filed by the respective parties through their aforesaid attorneys; and having considered the matter, and being of the opinion that the prayer of the aforesaid petitions should be granted, and being satisfied that the requirements of the laws relating to the continuous operation of the Railroad have been complied with,

It is on this 19th day of December, 1944, on motion of Wall, Haight, Carey & Hartpence, attorneys for petitioners, Ordered, Adjudged and Decreed as follows:

1. All orders heretofore made herein to the contrary notwithstanding, petitioner, Hoboken Railroad, Warehouse and Steamship Connecting Company, be and it is hereby authorized and empowered to serve written notice upon Hoboken Manufacturers Railroad Company, debtor, and upon Forrest S. Smith, trustee, of the termination of the [fol. 77] lease by and between said Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company, dated June 19, 1906, in accordance with the terms thereof, and at 12 o'clock midnight December 31, 1944 after service of such notices to enter into and upon the demised premises as delineated on the map and described in the inventory and description attached to said lease, including all additional property, real or personal, acquired by the lessee during the existence of the lease and which has become part of the demised premises, and thenceforth hold, possess, and enjoy the same free from any right of the said debtor or trustee to use the demised premises for any purposes whatever.

2. Upon the giving of such notice and entry into and upon the said premises by the said petitioner, any right, title and interest of the debtor or of the trustee to the use of the demised premises and such additional property shall absolutely cease and terminate as though said lease had never been made.

3. Notwithstanding conflicting claims thereto, within the time and in the manner set forth in this order all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, whether real, personal or mixed, excepting money in bank, cash on hand, accounts receivable, choses in action or other intangible claims, and the evidences thereof, shall be delivered to said Hoboken Railroad, Warehouse and Steamship Connecting Company by the trustee. The trustee, or any other claimant, may thereupon file a claim or claims with the Clerk of this court, after first serving a copy thereof upon said company or its attorneys, for recovery of such property or its value and reasonable compensation for the use thereof, which claims will thereupon be determined by this court through reference to a Master or otherwise.

4. Upon the entry into the demised premises hereinabove referred to as Plot A by said Hoboken Land and Improve- [fol. 78] ment Company, the trustee shall leave in the Railroad office building located on said premises such records and documents of the debtor presently in his possession as are necessary to the continued and uninterrupted operation of the railroad, such records and documents to be carefully preserved and used by the petitioner, Hoboken Railroad, Warehouse and Steamship Connecting Company, in its operation of said railroad, on the express condition; however, that it and said Hoboken Land and Improvement Company afford access to and permit the temporary removal of all such records and documents by the trustee and his duly authorized agents at any time until the further order of this court.

5. That, pending its delivery; the trustee shall have an inventory made of all property, whether real, personal, or mixed, which he is to deliver to Hoboken Railroad, Warehouse and Steamship Connecting Company, and simultaneously with the surrender thereof to it said Hoboken Railroad, Warehouse and Steamship Connecting Company shall deliver to the trustee an itemized receipt, to be prepared by him from said inventory for the property so transferred in accordance with the terms of this order.

6. Locomotive No. 601, ownership of which is claimed by the lessor and by Seatrain Lines, Inc., shall remain in the possession of the trustee until the further order of this Court.

7. The estates granted by Hoboken Land and Improvement Company to Hoboken Manufacturers Railroad Company, debtor, by the aforesaid leases of the land and lands under water, known respectively as Plot A and Plot B, and particularly described as follows:

Plot A

"Beginning at a point in what would be the westerly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ten (210) feet [fol. 79] northerly from the southerly line of Fourteenth Street and running thence (1) westerly and parallel to the southerly line of Fourteenth Street four hundred and seventy (470) feet to a point in what would

be the easterly line of Bloomfield Street if Bloomfield Street were extended northerly; thence (2) northerly along what would be the easterly line of Bloomfield Street if so extended, one hundred and fifty (150) feet to a point; thence (3) easterly and parallel to the southerly line of Fourteenth Street one hundred and seventy-seven (177) feet; thence (4) in a southerly direction one hundred and sixty-nine and eighty-nine hundredths (169.89) feet to a tangent point distant three hundred and nineteen and eighty-six hundredths (319.86) feet northerly at right angles from the southerly line of Fourteenth Street and one hundred and twenty-seven and ninety-two hundredths (127.92) feet westerly at right angles from the westerly line of Hudson Street extended northerly; thence (5) curving to the right with a radius of two hundred and twenty-four and sixty-five hundredths (224.65) feet one hundred and fifty-six and eight-eight hundredths (156.88) feet to a point in the westerly line of Hudson Street extended northerly distant two hundred and thirty-four and sixty-four hundredths (234.64) feet northerly from the southerly line of Fourteenth Street; thence (6) southerly along the westerly line of Hudson Street extended northerly twenty-four and sixty-four hundredths (24.64) feet to the point or place of beginning. Containing fifty-eight thousand one hundred and thirty three (58,133) square feet more or less.

Plot B

"Beginning at a point in what would be the easterly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ninety (290) feet northerly from what would be the southerly line of [fol. 80] Fourteenth Street if Fourteenth Street were extended easterly and running thence (1) northerly along what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (2) easterly and parallel to the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet; thence (3) southerly and parallel to what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (4) westerly and parallel to what would be the southerly line of Fourteenth Street if so extended one hundred

and eleven (111) feet to the point or place of beginning. Containing ninety-four thousand three hundred and fifty (94,350) square feet more or less."

be and they are hereby terminated, and the trustee is directed to peaceably and quietly release, surrender and yield unto the said Hoboken Land and Improvement Company, its successors and assigns, all and singular the said demised premises in accordance with the terms of said leases and in accordance with the terms of the indenture between Hoboken Land and Improvement Company and the debtor, dated January 19, 1915.

Guy L. Fake, U. S. D. J.

[fol. 81] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed December 21, 1944

Notice is hereby given that Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company and Seatrain Lines, Inc., a Creditor; in the above entitled proceeding hereby appeals to the United States Circuit Court of Appeals for the Third Circuit, from Order No. 39 entered in this proceeding December 19, 1944 terminating the lease dated June 19, 1906 between Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company, the Debtor herein, and the leases to Plot A and Plot B between Hoboken Land and Improvement Company and Hoboken Manufacturers Railroad Company, the Debtor herein.

James D. Carpenter, Jr., Attorney for Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor. Address: 75 Montgomery Street, Jersey City, N. J.

Collins & Corbin, Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc., Creditor, by Charles W. Broadhurst, a member of said firm and one of the attorneys of record doing business under said firm name. Address: 1 Exchange Place, Jersey City, N. J.

[fol. 82] EXHIBIT D-1

6/12/42

Article Third, Paragraphs B and L and Article Sixth of the Lease Dated June 19, 1906, Between Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company.

1. Article Third, Paragraph (b):

"(b) Throughout the term of this lease, the Lessee shall and will from time to time, and at all times, operate the demised premises as required by all legal enactments from time to time in force and applicable thereto, and keep and maintain the demised premises and all property at any time subject to this indenture or any indenture supplemental hereto, in thorough repair, good working order and condition, and fully supplied with such rolling stock, equipment or other appliances as may be needed fully to develop, maintain and encourage the business of the railroad of the Lessor, supplying and replacing all locomotives and other engines, cars and rolling stock of every description, poles, lines, wires, rails, ties, road-bed, buildings, power houses, power plants or electrical appliances, machines, implements and every appliance whatsoever, so that at all times hereafter, during the term hereby granted, the demised premises and said property may be properly improved, exploited, advanced and advantaged in keeping with the business demands of the community, and as good skill and judgment shall demand, and that the same shall continue to be kept in the same good order and condition at all times thereafter to which the same may at any time be advanced; but the Lessee shall not be required to construct or maintain any power house or power plant on the [fol. 83] demised premises so long as the Lessee shall be able to obtain and shall obtain by purchase the necessary power without such construction. The Lessee shall at all times hereafter make or cause to be made all such improvements of, and betterments on, the demised premises as shall be requisite in order that all freight destined to any point on the lines of railroad subject to this lease or on any connecting switch or

siding or which may be reached thereby or thereover, as well as all freight delivered for transportation at any point reached by the lines of railroad subject to this lease or any connecting switch or siding destined to any point on the lines of railroad subject to this lease or on any connecting switch or siding or which may be reached thereby or thereover, may be expeditiously and efficiently handled without delay.

"The Lessee shall at all times hereafter, at its own expense, keep the railway system of the Lessor equipped with a sufficient number of engines, electric motors and cars, and with all the electrical and other power appliances that may be needed, of whatever character or description the same may be, and keep the power houses, stations, depots and the like fully furnished and equipped, and on hand all necessary poles, machines, machinery and the like, so that in case of the termination of this indenture at any time, the demised premises shall be adequately furnished and equipped to carry on business and continue its operations. All equipment and rolling stock and all other property acquired in compliance with this covenant shall be acquired in the name of the Lessor but without incurring any liability in respect thereof on the part of the Lessor and without incurring any indebtedness the holders of which shall be entitled, under the laws of New Jersey, to have or claim in respect thereof, any lien on the demised premises, but the Lessor shall, on the termination of this lease, pay the Lessee for all [fol. 84] equipment and rolling stock so acquired by the Lessee in compliance with this covenant other than equipment or rolling stock acquired to replace equipment or rolling stock constituting at the beginning of the term, part of the demised premises, the value thereof in the condition in which the same shall then be, to be fixed in case of difference by arbitration."

. . . . . .

2. Article Third, Paragraph (1):

"(1) The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous con-

sent of the Lessor expressed by endorsement on this lease made in pursuance of authority granted by resolution of the board of directors of the Lessor, nor without like consent expressed as aforesaid, mortgage the interest of the Lessee in the demised premises, save (1) to raise moneys for use exclusively for the improvement and betterment of the demised premises and to an amount not exceeding the actual cost of such improvements and betterments or (2) for the purpose of defraying the cost of the construction by the Lessee, in accordance with the provisions of Article Ninth of this indenture, of an elevated or sub-surface railroad upon the demised premises and to an amount not exceeding the actual cost of such construction. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without [fol. 85] the consent of the Lessor first had and obtained in the manner hereinbefore provided."

* * * * * * *

3. Article Sixth.

"Sixth. During the existence of this lease, the Lessee, subject to the provisions of Article Eighth hereof, may acquire at its own sole cost and expense, any additional property, real or personal, which the Lessee may deem necessary or advisable to acquire for the maintenance or operation of the lines of railroad subject to this indenture or for the improvement of the demised premises, or in extensions thereof; all such additional property shall be acquired in the name of the Lessor, and without incurring liability in respect thereof on the part of the Lessor, or indebtedness, the holders of which might be entitled under the laws of New Jersey to have or claim in respect thereof a lien on the demised premises.

"(a) At the expiration of the term granted by this lease,

"(1) The Lessor shall be entitled to have and retain as its own property, without making any payment in respect thereof, all such additional buildings and structures as within the fourteen years next preceding the expiration of the term, shall have been erected or placed upon the demised premises without the previous written consent and approval of the Lessor.

"(2) For any other additional buildings, or structures, which are of a permanent character, the Lessor shall pay the Lessee the value thereof, to be fixed in case of disagreement by arbitration. Such value shall, for the purposes of this Article, be deemed to be [fol. 86] the difference between the value, for railroad purposes, of the demised premises at the expiration of the term with such buildings thereon, and their value without such buildings, not exceeding in any event the cost of such buildings.

"(3) The Lessor shall be entitled, at its election, to have delivered to it, as its property, any other additional buildings not of a permanent character, or any of such additional personal property, and if the Lessor shall elect so to take the same, the Lessor shall pay the Lessee the value thereof, to be fixed, in case of disagreement, by arbitration. The value of any such buildings or structures shall, for the purposes of this Article, be deemed to be the difference between the value, for railroad purposes, of the demised premises at the expiration of the term, with such buildings thereon, and their value without such buildings or structures, not exceeding in any event, the cost thereof. The Lessee shall give notice in writing to the Lessor not more than ten months nor less than eight months prior to the expiration of the term granted by

this indenture, specifying in detail the buildings and personal property covered by this clause and requiring the Lessor to elect whether the Lessor will attain any of such buildings and any of such additional personal property. The Lessor, if it desires to retain any thereof, shall give notice of such election to the Lessee not less than six months before the expiration of the term. Such notice shall be in writing and shall be sufficiently given if sent through the mails, registered and postage prepaid, addressed to the Lessee, at Hoboken, [fol. 87] New Jersey. Any personal property which the Lessor shall elect not so to take, the Lessee shall not be required to deliver to the Lessor and may remove from the demised premises; any such buildings or structures as it shall elect not so to retain, the Lessee may, at any time prior to the expiration of the term, remove from the demised premises; if not so removed within said period, they shall become the property of the Lessor, without liability on its part to make payment in respect thereof.

"Any loss, damage or injury to any such building or personal property which may happen prior to the expiration of the term granted by this indenture, from whatever cause arising, shall be borne by the Lessee.

"(b) If this lease be terminated, before the expiration of the term granted by this indenture, for any breach or default of the Lessee in the covenants or conditions hereof, the Lessor shall be entitled to the delivery and possession as part of the demised premises of all such additional property, real or personal, and shall not be required, on such termination hereof, or on re-entry, to pay for any of said additional property, real or personal, but shall be entitled to retain the same without payment, as its property.

"The Lessor shall be entitled at the expiration of the term hereby granted, to the delivery and possession as

part of the demised premises, in which term wherever used herein, such additional property shall be deemed included, of all such additional property, real or personal. For failure on the part of the Lessor to make any payment in accordance with the foregoing provisions of clause (2) of subdivision (a) of this Article, [fol. 88] the remedy of the Lessee shall be in damages, the amount thereof to be determined by arbitration. Any payment called for on the part of the Lessor under the provisions of clause (3) of sub-division (a) of this article shall, if the amount thereof be determined by agreement or award prior to the expiration of the term granted by this lease, be made at the expiration of said term; or if the amount thereof be not so determined prior to the expiration of said term, within fifteen days after the amount thereof shall be thereafter so determined by agreement or award.

"In case of failure on the part of the Lessor to make any payment within the period for that purpose above limited, the Lessee may, in lieu of instituting proceedings for the recovery of the value as so determined of any property specified in said clause (3), elect, by written notice to the Lessor, within thirty days after such value shall be so determined and become payable, and in that event shall be entitled, in satisfaction of the liability of the Lessor in respect thereof, to remove from the demised premises within thirty days the buildings not of a permanent character specified in said clause and the value of which the Lessor shall have so failed to pay, and to the redelivery to it by the Lessor on the demised premises of any other personal property specified in said clause, the value of which the Lessor shall have so failed to pay."

[fol. 89] EXHIBIT D-4

6/12/44

An Indenture made the 19th day of January, in the year of our Lord one thousand nine hundred and fifteen, between Hoboken Land and Improvement Company, a corporation of the State of New Jersey, hereinafter termed the Improvement Company, party of the first part, and Hoboken Manu-

facturers Railroad Company, a corporation of said State of New Jersey, hereinafter termed the Manufacturers Company, party of the second part.

By two certain indentures of lease bearing date the 19th day of June 1906, and hereinafter termed the Leases, the Improvement Company demised and leased unto the Manufacturers Company certain properties of the Improvement Company in the Leases respectively described. For the contents of the Leases, reference is made thereto.

Simultaneously with the execution and delivery of the Leases, Hoboken Railroad Warehouse and Steamship Connecting Company, hereinafter termed the Railroad Company, executed and delivered to the Manufacturers Company a lease, bearing date said 19th day of June, 1906, of the railroad and property of the Railroad Company. For the contents of said lease, and of the supplements thereto, reference is made to said lease and said supplements; and of the contents of all thereof both the parties have knowledge. Said lease is hereinafter termed the Railroad Lease.

The Improvement Company was at said time and ever since has been the owner and holder of practically the entire capital stock of the Railroad Company, and the leases were executed and delivered by the Improvement Company, and accepted by the Manufacturers Company in contemplation of the execution and delivery of the Railroad Lease; and it was the intention of the Improvement Company and of the Manufacturers Company that the Leases should be dependent upon the Railroad Lease and that any breach of [fol. 90] any of the covenants or conditions of the Railroad Lease should be deemed a breach of the covenants or conditions of the Leases respectively; and that on the accrual of a right of entry under the Railroad Lease, a right of entry should likewise accrue under the Leases respectively.

For a valuable consideration by the Improvement Company to the Manufacturers Company paid, the receipt of which is acknowledged, and in order to effectuate the intention of the parties, it is agreed as follows:

First. Each of the Leases shall be dependent upon the Railroad Lease as the Railroad Lease has been or may hereafter at any time be supplemented or modified, and each of the Leases, if not theretofore terminated, shall terminate at the expiration of the term of the Railroad Lease or the earlier termination, for any cause or in any manner what-

ever, of the Railroad Lease, and although such termination be by agreement. Any breach of any covenant or condition of the Railroad Lease or of any supplement thereto, or of any instrument of modification thereof, shall be deemed a breach of the covenants or conditions of the Leases respectively and on the accrual of a right of entry under the Railroad Lease as the Railroad Lease has been or may hereafter at any time be supplemented or modified, a right of entry shall likewise accrue under each of the Leases respectively.

Second. In all other respects, each of the Leases is continued, and the Improvement Company and the Manufacturers Company covenant with each other as set out in such lease.

Third. The Manufacturers Company represents and covenants that the Leases and each of them and the leasehold estates demised by the Leases, are, at the time of the execution and delivery hereof, vested in the Manufacturers Company free from encumbrances, and that the Manufacturers Company is authorized to make this agreement.

[fol. 91] In Witness Whereof, the parties to this agreement have caused their respective corporate seals to be hereunto affixed, and these presents to be subscribed by their duly authorized officers as of the day and year first above written.

Hoboken Land and Improvement Company, by Richard Stevens, Vice President.

Attest: Edwin A. S. Brown, Ass't Secretary.

Hoboken Manufacturers Railroad Company, by Charles D. Boyles, President.

Attest: Geo. H. Hobbs, Secretary.

Acknowledged, —— —, ——.

[fols. 92-93] IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Appendix to Appellee's Brief

ARTICLE FIFTH OF THE LEASE DATED JUNE 19, 1906 BETWEEN HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY AND HOBOKEN MANUFACTURER'S RAILROAD COMPANY

"Fifth. It is mutually covenanted as follows:

* * * * * * *

If the Lessee (1) shall, at any time or times hereafter during the continuance of this agreement, omit or fail to make the payments hereinabove agreed to be made, or any of them, and such default shall continue for the space of thirty days, or (2) shall fail punctually and faithfully to observe, keep and perform any other of the covenants and agreements hereof, and such default shall continue for the space of thirty days after notice from the Lessor of such default, and requiring the Lessee to remedy the same, then and in either of such cases, the Lessor may at any time, either

(a) proceed by proper action or actions in the proper courts, either at law or in equity, to enforce performance of such covenants by the Lessee or to recover damages for the breach thereof; or

(b) by notice in writing, terminate this lease, and thereupon enter into and upon the demised premises, and thenceforth hold, possess and enjoy the same free from any right of the Lessee, or its assigns, to use the demised premises for any purposes whatever, and thereupon any right, title and interest of the Lessee to the use of the demised premises shall absolutely cease and terminate as though this lease had never been made; but the Lessor shall, nevertheless, have the right to recover from the Lessee any and all amounts which, [fol. 94] under the terms hereof, may be then due and unpaid for the use of the demised premises.

* * * * * * *"

EXCERPT FROM PETITION OF FORREST S. SMITH, TRUSTEE—
Filed January 20, 1944

"3.—That subsequent to petitioner's qualification as Trustee, he examined into the affairs of the Debtor and conferred with the representatives of parties in interest and ascertained that the principal executory contract to which the Debtor is a party consists of a ninety-nine year lease dated June 19, 1906 between Hoboken Railroad Warehouse and Steamship Connecting Company as lessor and the Debtor as lessee embracing the main line of railroad, including all rights of way, station and terminal grounds and other lands and interests in lands and the majority of the rolling stock and equipment presently operated by the Debtor. Petitioner also ascertained that other leases and agreements vitally affecting the operations of the Debtor existed. He also learned and believes that one of the principal reasons for the filing of the petition for the reorganization of the Debtor was its inability to satisfy the total rent demanded by Hoboken Railroad Warehouse and Steamship Connecting Company under the aforesaid lease. * * *"

[fol. 95] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

In the Matter of HOBOKEN MANUFACTUERS RAILROAD COMPANY, Debtor.

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and Hoboken Land and Improvement Company, Appellees

On Appeal from Order No. 39 of United States District Court for the District of New Jersey

NOTICE OF MOTION FOR STAY

To Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, Appellees, 15 Exchange Place, Jersey City 2, N. J.

SIRS:

Please Take Notice that on Thursday, December 28, 1944 at 11:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned will apply to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, at the United States Court House, Ninth and Chestnut Streets, Philadelphia, Pennsylvania, for an Order staying Hoboken Railroad, Warehouse and Steamship Connecting Company from entering into and upon the demised premises as delineated on the map and described in the inventory and description attached to the lease dated June 19, 1906 between it [fol. 96] and Hoboken Manufacturers Railroad Company, including all additional property, real or personal, acquired by the lessee during the existence of said lease and which has become part of the demised premises, and also staying the termination of the estates granted by Hoboken Land and Improvement Company, to said Hoboken Manufacturers

Railroad Company under leases dated June 19, 1906, which leased premises are respectively known as Plot A and Plot B, under the terms of Order No. 39, entered December 19, 1944 by the United States District Court for the District of New Jersey, pending the determination of the appeal which has been taken by Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, to the United States Circuit Court of Appeals for the Third Circuit from said Order No. 39, and

Take Further Notice that the annexed petition, together with certified copies of the opinion and Order No. 39 therein referred to as Schedules "A" and "B" will be submitted to the Court at the hearing of the above application by the undersigned in support thereof.

Dated Jersey City, N. J., December 26, 1944.

James D. Carpenter, Jr., Attorney for Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor, Address: 75 Montgomery Street, Jersey City 2, N. J. Collins and Corbin, Attorneys for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc., a Creditor, By Charles W. Broadhurst, a member of said firm and one of the attorneys of record doing business under said firm name, Address: 1 Exchange Place, Jersey City 3, N. J.

[fol. 97] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and Hoboken Land and Improvement Company, Appellees

On Appeal from Order No. 39 of United States District Court for the District of New Jersey

APPELLANTS' PETITION FOR STAY

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

1. Your petitioners, Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., feeling themselves aggrieved by a certain Order No. 39 made on December 19, 1944 by the United States District Court for the District of New Jersey in the matter of Hoboken Manufacturers Railroad Company, Debtor, did, on December 21, 1944, duly file a notice of appeal to this Honorable Court from said Order with the Clerk of the United States District Court for the District of New Jersey, a copy of which notice of appeal was thereupon on the same day served upon Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, the Appellees herein.

2. The aforesaid Order No. 39 was granted on the motions of Hoboken Railroad, warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company after entry of an opinion rendered by Honorable [fol. 98] Guy L. Fake for the United States District Court for the District of New Jersey and filed August 4, 1944,

wherein certain motions for leave to serve notice terminating a lease dated June 19, 1906 between Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company, the said Debtor, and also terminating two other leases between Hoboken Land and Improvement Company and the said Debtor were granted. A true copy of the aforesaid opinion is annexed hereto, made a part hereof and marked Schedule "A".

3. By the terms of the aforesaid Order No. 39, of which a true copy is annexed hereto, made a part hereof and marked Schedule "B", Hoboken Railroad, Warehouse and Steamship Connecting Company is authorized and empowered to serve written notice upon said Debtor and said Trustee of the termination of the lease between it and Hoboken Manufacturers Railroad Company, dated June 19, 1906, in accordance with the terms thereof and at 12 o'clock midnight, December 31, 1944 to enter into and upon the demised premises, including all additional property, real or personal, acquired by the lessee during the existence of the lease and which has become part of the demised premises and thenceforth hold, possess and enjoy the same free from any right of the said Debtor or Trustee to use the demised premises for any purposes whatever.

4. On December 21, 1944, and immediately after the filing of the aforesaid notice of appeal herein your petitioners noticed a motion before Judge Fake for a stay of the operation of said Order No. 39 pending said appeal or, in the alternative, until an application for such a stay might be heard and determined by this Honorable Court. Said application was heard before Judge Fake on Tuesday, December 26 and after hearing arguments of counsel for the Appellants and the Appellees an Order was entered in the [fol. 99] United States District Court for the District of New Jersey denying a stay pending the instant appeal and reciting the grounds for such denial. A true copy of the aforesaid order, dated December 26, 1944 is annexed hereto, made a part hereof and marked Schedule "C".

5. Hoboken Manufacturers Railroad Company, the Debtor herein, filed its petition for reorganization under Section 77 of the Bankruptcy Act, as amended, in the United States District Court for the District of New Jersey on July 26, 1943 and on the same day an Order was

entered by said Court approving the filing of said petition. Said Debtor is a corporation of New Jersey and a common carrier by railroad subject to the Interstate Commerce Act. The only railroad which said Debtor operates is a switching line along the waterfront of Hoboken, New Jersey. Its line connects on the north with the line of the Erie Railroad Company and through this connection and also through a float bridge, it interchanges freight with other trunk line railroads serving New York Harbor. One primarily to war traffic, after accruing all known claims and operating expenses, including all rent required to be paid under the aforesaid leases with Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, the railroad operations have been currently producing a profit of between $4,000 and $5,000 monthly under the management of the Trustee.

6. The major part of the Debtor's right of way and line of railroad is held by it under the lease dated June 19, 1906 for a term of 99 years from Hoboken Railroad, Warehouse and Steamship Connecting Company. A number of disputes have arisen between Hoboken Railroad, Warehouse and Steamship Connecting Company as landlord under the lease with it and the Trustee of the property of the Debtor concerning the ownership of and title to [fol. 100] certain parcels of real estate and personal property used for railroad purposes because of the terms and conditions relating to forfeiture of property upon termination of said lease after a breach thereof.

7. There is now pending before a Special Master appointed by the United States District Court for the District of New Jersey on the petition of the Trustee for instructions and cross reclamation petitions by Seatrain Lines, Inc. and Hoboken Railroad, Warehouse and Steamship Connecting Company, respectively, for determination and report the question of the ownership of Locomotive No. 601 as well as the question of the Court's jurisdiction to determine such ownership. The Trustee has, pursuant to the instructions of the lower court, continued in possession of and used said locomotive in the operation of the railroad pending such determination.

8. Judge Fake at page 2 of his opinion, see Schedule "A", quotes the pertinent part of the Hoboken Railroad,

Warehouse and Steamship Connecting Company lease, which said landlord claims was breached by the qualification of the Trustee, and at page 5 thereof recites the first question to be disposed of as whether the "debtor-lessee" had any property in the lease when it filed its petition, and the second and final question as: "Did the passing of such title to the trustee constitute a breach of the terms of the lease entitling the lessor to re-enter pursuant to notice as in the lease provided?" Both questions are answered in the affirmative, although the Court at page 4 of the opinion recognized the rule of law followed in the United States Circuit Court of Appeals for the Second Circuit in *Palmer v. Palmer*, 104 Fed. (2nd) 161, if followed here would produce a negative answer to the second question as above quoted. Our problem is also recognized by Judge Fake in his opinion as one of first instance, he having found no case of like tenor in this circuit or in the case law of New Jersey.

[fol. 101] 9. The time within which the Debtor is to file its plan of reorganization has been extended by Order No. 31 entered on August 14, 1944 to February 24, 1945. In the event Order No. 39 is not reversed and the properties under the foregoing leases revert thereunder to Appellees herein, then all possibility of reorganizing the railroad of the Debtor will fail.

10. Your petitioners are of the opinion and therefore allege that the interests of all parties to the instant reorganization will be best served by the continued operation of the railroad by the Trustee under the control and direction of the court pending determination of this appeal, subject to such terms as this Honorable Court may prescribe regarding continued payment of rent or other compensation to the Appellees and setting aside of profits, until a decision is reached as this Honorable Court may fix.

Wherefore your petitioners pray that an order may be entered herein staying Hoboken Railroad, Warehouse and Steamship Connecting Company from entering into and upon the demised premises as delineated on the map and described in the inventory and description attached to the lease dated June 19, 1906 between it and Hoboken Manufacturers Railroad Company, including all additional prop-
[fol. 102] erty, real or personal, acquired by the lessee during the existence of said lease and which has become

part of the demised premises, and also staying the termination of the estates granted by Hoboken Land and Improvement Company, to said Hoboken Manufacturers Railroad Company under leases dated June 19, 1906, which leased premises are respectively known as Plot A and Plot B, under the terms of Order No. 39, entered December 19, 1944 by the United States District Court for the District of New Jersey, pending the determination of this appeal from said Order No. 39.

Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor, by James D. Carpenter, Jr., Attorney. Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc., a Creditor, by Collins & Corbin, Attorneys.

STATE OF NEW JERSEY,
County of Essex, ss:

Forrest S. Smith, of full age, being duly sworn according to law, upon his oath deposes and says:

That I am one of the petitioners in the foregoing petition named and Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor; I have read said petition, know the contents thereof, and the matters and things therein contained are true as I verily believe.

Forrest S. Smith.

Subscribed and sworn to before me this 26 day of December, 1944. W. W. Heironimus, a Notary Public of New Jersey. (Seal.)

[fol. 103] SCHEDULE "A"

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

OPINION—No. 4873a

In the Matter of HOBOKEN MANUFACTURERS' RAILROAD COMPANY, Debtor

Appearances:

Messrs. Carpenter, Gilmour & Dwyer, by James D. Carpenter, Jr., Esq., and Charles B. Collins, Esq., Attorneys for Trustee.

Messrs. Collins & Corbin, by Edward A. Markley, Esq., Attorneys for Hoboken Manufacturers' Railroad Company and Seatrain Lines, Inc.

Messrs. Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Esq., Attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company.

FAKE, District Judge:

This is a Railroad Reorganization Proceeding under Title 11 U. S. C. A. Section 205.

The present issues arise on a motion to permit the lessor to terminate a ninety-nine year railroad lease executed June 19, 1906, on the ground of a breach of the terms of the lease. The clause relied upon by the lessor, insofar as pertinent, reads as follows:

> [fol. 104] "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, or any part thereof, or the rights and privileges, or any of them, hereby granted, without the previous consent of the Lessor * * *. This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, or any part thereof, or of the said rights and privileges, or any of them, whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained in the manner hereinbefore provided."

It is urged that upon the qualification of the trustee herein he acquired such an interest in the lease as to constitute a breach or violation of the conditions above quoted.

It will be noted that this clause is not worded in the exact language found in the usual bankruptcy forfeiture clauses nor is it worded as are the general run of the forfeiture clauses directed against assignment without the consent of the lessor. Here a default is contemplated not only if any sale or transfer of the demised premises is made by the lessee without the authorization of the lessor, but also

if a transfer is brought about by any proceeding at law or in equity wherein the lessee is a party, whereby any of the duties of the lessee may be "encumbered, abrogated or in any manner altered."

Jones on Landlord and Tenant, Section 466, is cited with apparent approval in Gazlay vs. Williams, 210 U. S. 41. That section reads as follows: "an ordinary covenant against subletting and assignment is not broken by a transfer of the leased premises by operation of law, *but the* [fol. 105] *covenant may be so drawn as to expressly prohibit such a transfer, and in that case the lease would be forfeited by an assignment by operation of law.*" And that text so approved is now given the strength of statutory sanction by Title 11 U. S. C. A. Sec. 110b, wherein it is enacted that "*an express covenant that an assignment by operation of law* or the bankruptcy of a specified party thereto or of either party *shall terminate the lease or give the other party an election to terminate the same shall be enforceable.*"

Title 11 U. S. C. A. Section 205(c)(2) provides that "The trustee * * * shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee appointed pursuant to section 72 or any other section of this title, and, to the extent not inconsistent with this section, * * *." This means that title vests in the trustee in a railroad reorganization proceeding to the same extent that it vests in a trustee in a general bankruptcy proceeding. As to the latter the United States Supreme Court held is Isaacs, Trustee vs. Hobbs Tie & Timber Co., 282 U. S. 734, that "all property owned and possessed by the bankrupt vests in the trustee." These last quoted words are so clear as to require no further attempts at elucidation. The language "all property owned and possessed by the bankrupt" does not except leases because they may happen to carry a burden with them. They may be abandoned. They do vest however in the trustee.

Turning now to Section 110(b) of Title 11, it is found, with relation to unexpired leases of real property, that the trustee is allowed 60 days, (or an extended period) after adjudication to assume or reject such leases. This is to say, in the instant case, the title of the debtor-lessee be- [fol. 106] came vested in the trustee subject to being divested by a rejection. This should be read in connection

with Title 11 U. S. C. A. 110(a) which enacts that the trustee is "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition."

The case of Palmer vs. Palmer, 104 Fed. 2nd 161, is relied on by the debtor-lessee for the proposition that, "A lease, being property cum onere, does not pass to a trustee in bankruptcy, unless he adopts it. * * *." "Yet" (says Judge Learned Hand in the opinion) "if the question were to arise for the first time, it would be a little hard to see by what power the court could keep a trustee in possession while he was determining his course, without compelling him meanwhile to fulfill the conditions imposed upon the term * * *. * * * insolvency ought not to give the lessee's creditors greater rights to possession than the lessee himself enjoyed; * * *. This necessity should be in no sense affected by the fact that the property may be a railroad, * * *. The question does not concern the public, but is a dispute between two groups having interests in the property * * *." The Judge then says: "Nevertheless, the contrary has been generally held; * * *." The foregoing quotations are extracted from the opinion in the Palmer case, because they disclose the individual views of one whose opinions are held in the highest esteem, and they seem to indicate a reluctance on his part to follow the law as he found it. This reluctance however was dissipated in the rule of stare decisis as he found it in his circuit based upon In re Frazin, 183 Fed. 28 (1910). No case of like tenor has been found in this circuit or in the case law of New Jersey. This court therefore is free to approach the problem raised as one of first instance.

[fol. 107] The lease contains a further clause providing that in the event of a breach of covenant and the lapse of thirty days after notice of termination given by the lessor, the lessor may enter. The notice so provided has been served and thirty days have elapsed.

The first question to be disposed of here is: Did the debtor-lessee have any property in the lease at the time it filed its petition herein? The answer is, Yes. It had a leasehold subject to forfeiture on notice in the event of a transfer of the leasehold by operation of law in any proceeding wherein the lessee might be a party. Nothing else appearing, that estate is the specific estate which the trustee herein took upon his qualification.

The second and final question is: Did the passing of such title to the trustee constitute a breach of the terms of the lease entitling the lessor to re-enter pursuant to notice as in the lease provided? Here again the answer is, Yes.

A reading of the clause under consideration discloses that the character or quality of that which is contemplated as passing by operation of law must be such as would transfer, encumber, abrogate or alter any of the rights, duties or obligations of the lessee.

The transfer, here by operation of law, has placed the trustee in possession and he is quite a different occupant than the lessee named in the lease. Moreover when the trustee took, the result of his taking was to abrogate and alter the terms of the lease by reason of Section 110(b) of Title 11 of the Act, which in effect reads a sixty day period into the lease without the lessor's consent, within which [fol. 108] time an adoption or rejection may take place. Surely this would force a different contract on the parties than that into which they each entered with their eyes open. Such a result cannot be justified either by the statutory law, the case law in this circuit, or on the basis of sound reason.

It appears that the trustee herein petitioned the court for leave to adopt the lease while the instant motion was pending and the prayer of the petition was granted. It is argued from this that such adoption resulted in the transfer of the title of the lease in breach of the terms of the lease. By reason of the conclusions above arrived at, I deem it not necessary to pass upon the issue thus raised other than to say: that since the debtor-lessee's title passed to the trustee prior to the adoption, nothing was gained or lost by the adoption insofar as present issues are involved. The motion to terminate the lease is granted to take effect upon production to the court of conclusive evidence that the requirements of the laws relating to the continuous operation of the railroad have been complied with.

[fol. 109] [Endorsed:] United States District Court, District of New Jersey. In the Matter of Hoboken Manufacturers Railroad Company, Debtor. Opinion No. 4873a. G. L. Fake, District Judge. Filed: August 4th, 1944.

[fol. 110] SCHEDULE "B"

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

No. 4873A

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

ORDER NO. 39 TERMINATING LEASES

This matter coming before the court upon the petition of Hoboken Railroad, Warehouse and Steamship Connecting Company for an order permitting the petitioner to serve written notice upon the debtor of the termination of the lease by and between petitioner and debtor, dated June 19, 1906, and to forthwith enter into and upon the demised premises and henceforth hold, possess and enjoy the same free from any right of the trustee or debtor, and the petition of Hoboken Land and Improvement Company for an order terminating the leases of certain lots, tracts or parcels of land and lands under water in the City of Hoboken, Hudson County, New Jersey, known respectively as Plot A and Plot B, and more particularly described in the aforesaid petition of said Hoboken Land and Improvement Company, and the court having heard the arguments of Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, attorneys for petitioners, and James D. Carpenter, Jr., by Charles B. Collins, attorney for trustee, and Collins and Corbin, by Charles Broadhurst, attorneys for and of counsel with the debtor and Seatrain Lines, Inc., and having read the briefs filed by the respective parties through their aforesaid attorneys, and having considered the matter, and being of the opinion that the prayer of the aforesaid petitions should be granted, and being satisfied that the requirements of the laws relating to the continuous operation of the Railroad have been complied with,—

It is on this 19th day of December, 1944, on motion of [fol. 111] Wall, Haight, Carey & Hartpence, attorneys for petitioners, Ordered, Adjudged and Decreed as follows:

1. All orders heretofore made herein to the contrary notwithstanding, petitioner, Hoboken Railroad, Warehouse and Steamship Connecting Company, be and it is hereby

authorized and empowered to serve written notice upon Hoboken Manufacturers Railroad Company, debtor, and upon Forrest S. Smith, trustee, of the termination of the lease by and between said Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Manufacturers Railroad Company, dated June 19, 1906, in accordance with the terms thereof, and at 12 o'clock midnight December 31, 1944 after service of such notices to enter into and upon the demised premises as delineated on the map and described in the inventory and description attached to said lease, including all additional property, real or personal, acquired by the lessee during the existence of the lease and which has become part of the demised premises, and thenceforth hold, possess, and enjoy the same free from any right of the said debtor or trustee to use the demised premises for any purposes whatever.

2. Upon the giving of such notice and entry into and upon the said premises by the said petitioner, any right, title and interest of the debtor or of the trustee to the use of the demised premises and such additional property shall absolutely cease and terminate as though said lease had never been made.

3. Notwithstanding conflicting claims ~~thereto~~, within the time and in the manner set forth in this order all property of the debtor in the possession or under the control of the trustee and presently held or used for railroad purposes, whether real, personal or mixed, excepting money in bank, [fol. 112] cash on hand, accounts receivable, choses in action or other intangible claims, and the evidences thereof, shall be delivered to said Hoboken Railroad, Warehouse and Steamship Connecting Company by the trustee. The trustee, or any other claimant, may thereupon file a claim or claims with the Clerk of this court, after first serving a copy thereof upon said company or its attorneys, for recovery of such property or its value and reasonable compensation for the use thereof, which claims will thereupon be determined by this court through reference to a Master or otherwise.

4. Upon the entry into the demised premises hereinabove referred to as Plot A by said Hoboken Land and Improvement Company, the trustee shall leave in the Railroad office building located on said premises such records and docu-

ments of the debtor presently in his possession as are necessary to the continued and uninterrupted operation of the railroad, such records and documents to be carefully preserved and used by the petitioner, Hoboken Railroad, Warehouse and Steamship Connecting Company, in its operation of said railroad, on the express condition, however, that it and said Hoboken Land and Improvement Company afford access to and permit the temporary removal of all such records and documents by the trustee and his duly authorized agents at any time until the further order of this court.

5. That, pending its delivery, the trustee shall have an inventory made of all property, whether real, personal, or mixed, which he is to deliver to Hoboken Railroad, Warehouse and Steamship Connecting Company, and simultaneously with the surrender thereof to it said Hoboken Railroad, Warehouse and Steamship Connecting Company shall deliver to the trustee an itemized receipt, to be prepared [fol. 113] by him from said inventory for the property so transferred in accordance with the terms of this order.

6. Locomotive No. 601, ownership of which is claimed by the lessor and by Seatrain Lines, Inc., shall remain in the possession of the trustee until the further order of this Court.

7. The estates granted by Hoboken Land and Improvement Company to Hoboken Manufacturers Railroad Company, debtor, by the aforesaid leases of the land and land-under water, known respectively as Plot A and Plot B, and particularly described as follows:

Plot A

"Beginning at a point in what would be the westerly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ten (210) feet northerly from the southerly line of Fourteenth Street and running thence (1) westerly and parallel to the southerly line of Fourteenth Street four hundred and seventy (470) feet to a point in what would be the easterly line of Bloomfield Street if Bloomfield Street were extended northerly; thence (2) northerly along what would be the easterly line of Bloomfield Street if so extended, one hundred and fifty (150) feet to a point; thence (3) easterly and parallel to the southerly line of Fourteenth

Street one hundred and seventy-seven (177) feet; thence (4) in a southerly direction one hundred and sixty-nine and eighty-nine hundredths (169.89) feet to a tangent point distant three hundred and nineteen and eighty-six hundredths (319.86) feet northerly at right angles from the southerly line of Fourteenth Street and one hundred and twenty-seven and ninety-two hundredths (127.92) feet westerly at right angles from the westerly line of Hudson Street extended northerly; thence (5) curving to the right with a radius of two hundred and twenty-four and sixty-five hundredths (224.65) feet one hundred and fifty-six and eighty-eight hundredths (156.88) feet to a point in the westerly line of Hudson Street extended northerly distant two hundred and thirty-four and sixty-four hundredths (234.64) feet northerly from the southerly line of Fourteenth Street; thence (6) southerly along the westerly line of Hudson Street extended northerly twenty-four and sixty-four hundredths (24.64) feet to the point or place of beginning. Containing fifty-eight thousand one hundred and thirty-three (58,133) square feet more or less."

[fol. 114] Plot B

"Beginning at a point in what would be the easterly line of Hudson Street if Hudson Street were extended northerly distant two hundred and ninety (290) feet northerly from what would be the southerly line of Fourteenth Street if Fourteenth Street were extended easterly and running thence (1) northerly along what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (2) easterly and parallel to the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet; thence (3) southerly and parallel to what would be the easterly line of Hudson Street if so extended eight hundred and fifty (850) feet; thence (4) westerly and parallel to what would be the southerly line of Fourteenth Street if so extended one hundred and eleven (111) feet to the point or place of beginning. Containing ninety-four thousand three hundred and fifty (94,350) square feet more or less."

be and they are hereby terminated, and the trustee is directed to peaceably and quietly release, surrender and yield unto the said Hoboken Land and Improvement Company, its successors and assigns, all and singular the said demised premises in accordance with the terms of said leases and in accordance with the terms of the indenture between Hoboken Land and Improvement Company and the debtor, dated January 19, 1915.

Guy L. Fake, U. S. D. J.

[fol. 115] [Endorsed:] United States District Court, District of New Jersey. In the Matter of Hoboken Manufacturers Railroad Company, Debtor. No. 4873a. In Proceedings for the Reorganization of a Railroad. Order No. 39. Terminating Leases. Wall, Haight, Carey & Hartpence, Attorneys for petitioners, 15 Exchange Place, Jersey City, N. J. Filed Dec. 19, 1944.

[fol. 116] SCHEDULE "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

No. 4873A

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

In Proceedings for the Reorganization of a Railroad

Order No. 43

This matter coming before the Court on the duly noticed motion of Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company and Sea Train Lines, Inc., a creditor, for a stay pending the appeal to the Circuit Court of Appeals for the Third Circuit, or in the alternative, until an application may be made thereto for such a stay, of the operation of Order No. 39 entered herein on December 19, 1944, whereby Hoboken Railroad Warehouse and Steamship Connecting Company was authorized to give notice to the Debtor and Trustee terminating its lease of June 19, 1906 at 12 o'clock mid-

night on December 31, 1944, and to enter into the demised premises, including all additional property, real and personal, acquired by said Lessee during the existence of said lease and which has become part of the demised premises and the estates granted by Hoboken Land and Improvement Company under leases for Plot A and Plot B dated June 19, 1906, were also terminated, and the Court having heard the arguments of James D. Carpenter, Jr., by Charles B. Collins, Attorney for the Trustee, and Collins & Corbin, by Charles W. Broadhurst, Attorneys for the Debtor and Seatrain Lines, Inc., for the motion, and Wall, Haight, Carey & Hartpence, by Edward J. O'Mara, Attorneys for Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, in opposition thereto, and being of the opinion that said motion should be denied for the reasons set forth in a stenographic transcript annexed hereto and on the terms [fol. 147] suggested by counsel for said Hoboken Railroad Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company,

It Is On This 26th Day Of December, 1944,

Ordered that the aforesaid motion for a stay of the operation of Order No. 39 pending the appeal to the Circuit Court of Appeals for the Third Circuit be and the same is hereby denied on the following terms:

1. Pending the determination of said appeal Hoboken Railroad Warehouse and Steamship Connecting Company shall not sell, lease, mortgage or otherwise transfer or encumber the railroad property without the approval and order of this Court.

2. Pending the determination of said appeal Hoboken Railroad Warehouse and Steamship Connecting Company shall not declare or pay any dividends on its capital stock out of profits from the operation of the railroad earned subsequent to December 31, 1944.

3. Pending the determination of said appeal Hoboken Land and Improvement Company shall not sell, lease, mortgage or otherwise transfer or encumber the lands and premises known as Plot A and Plot B and particularly described in said Order No. 39, without the approval and order of this Court, except that said Hoboken Land and Im-

provement Company may lease said lands and premises to Hoboken Railroad Warehouse and Steamship Connecting Company for use in connection with the operation of the railroad.

Guy L. Fake, U. S. D. J.

[fol. 118] "The Court (Orally, at close of argument): Upon considering the argument that has been made here this morning, I conclude that the motion for a stay should be denied upon the terms suggested by Senator O'Mara.

"It is true the issues involved with relation to the leases have been before the Court for many months, and it was only after a most painstaking and careful study that I was led to the conclusion set forth in the opinion which I filed some months ago. If I had any doubt in my own mind as to the correctness of my opinion I would be inclined to grant a stay. It is my thought in this connection that an appeal having been taken, any stay should be made by the appellate court and not by this Court, under the peculiar facts and circumstances that are present in this case. This railroad differs from railroads generally. It is a very unique set-up. And in view of the terms and conditions outlined by Senator O'Mara, it is my thought that no evil can possibly follow the issuance of such an order. However, you should be free to make your application to the Circuit Court of Appeals for a stay.

"I think of nothing further at the moment that I would like to put upon the record."

Endorsements: Petition and Notice of Motion for Stay. Received & Filed December 27, 1944. Wm. P. Rowland, Clerk.

[fol. 119] [Endorsed:] In the District Court of the United States for the District of New Jersey. In the Matter of Hoboken Manufacturers Railroad Company, Debtor. No. 4873A. In Proceedings for the Reorganization of a Railroad. Order No. 43. James D. Carpenter, Jr., Esq., Attorney for Trustee, 75 Montgomery St., Jersey City 2, New Jersey; Collins & Corbin, Esqs., Attorneys for Debtor and Seatrain Lines, Inc., a Creditor, 1 Exchange Place, Jersey City 3, New Jersey.

[fol. 120] Service of the within Notice of Motion for Stay and Petition is hereby acknowledged this 26th day of December, 1944.

Wall, Haight, Carey & Hartpence, Attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company and Hoboken Land and Improvement Company, Appellees.

[Endorsed:] 8812. United States Circuit Court of Appeals for the Third Circuit. In the Matter of Hoboken Manufacturers Railroad Company, Debtor. Forrest S. Smith, Trustee, etc., et als., Appellants, vs. Hoboken Railroad, Warehouse and Steamship Connecting Company; et al., Appellees. Petition and Notice of Motion For Stay. James D. Carpenter, Jr., 75 Montgomery Street, Jersey City 2, N. J.; Collins & Corbin, 1 Exchange Place, Jersey City 2, N. J., Attorneys for Appellant-Petitioners. Received & Filed Dec. 27, 1944. William P. Rowland, Clerk.

[fol. 121] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8812

In the Matter of HOBOKEN MANUFACTURERS' RAILROAD COMPANY, Debtor

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Co., Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, and Hoboken Land and Improvement Company

And afterwards, to wit, the 28th day of December, 1944, come the parties aforesaid by their counsel aforesaid, and this case being called for hearing on Appellants' Petition for Stay, before the Honorable Charles Alvin Jones and Honorable Herbert F. Goodrich, Circuit Judges, and the

Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of December, 1944, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 122] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8812

In the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY and Hoboken Land and Improvement Company, Appellees

On Appeal from Order No. 39 of United States District Court for the District of New Jersey

Before Jones and Goodrich, Circuit Judges

ORDER FOR STAY

Application having been made pursuant to notice duly served for an order staying the operation of Order No. 39 of the United States District Court for the District of New Jersey, pending the hearing and determination of the Appeal taken from said Order to this Court, and the matter having been heard in the presence of James D. Carpenter, Jr. by Charles B. Collins, attorney for Forrest S. Smith, Trustee of the property of Hoboken Manufacturers Railroad Company, Debtor; Collins and Corbin by Charles W. Broadhurst, attorney for Hoboken Manufacturers Railroad Company, Debtor, and Seatrain Lines, Inc., Creditor; and Wall, Haight, Carey & Hartpence by Edward J. O'Mara, attorneys for Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken

Land and Improvement Company, and good cause appearing for the granting of said stay.

[fol. 123] It is on this twenty-eighth day of December, 1944 ordered that Hoboken Railroad, Warehouse and Steamship Connecting Company be and it is hereby stayed from entering into and upon the demised premises as delineated on the map and described in the inventory and description attached to the lease dated June 19, 1906 between it and Hoboken Manufacturers Railroad Company, including all additional property, real or personal, acquired by the lessee during the existence of said lease and which has become part of the demised premises, and termination of the estates granted by Hoboken Land and Improvement Company, to said Hoboken Manufacturers Railroad Company under leases dated June 19, 1906, which leased premises are respectively known as Plot A and Plot B, be and the same is also stayed, pending the determination of the Appeal taken herein from said Order No. 39, which was entered by the United States District Court for the District of New Jersey on December 19, 1944.

By the Court, Jones, Circuit Judge.

Endorsements: Order Granting Stay. Received and Filed Dec. 28, 1944. William P. Rowland, Clerk.

[fol. 124] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1944

No. 8812

In the Matter of Hoboken Manufacturers Railroad Company, Debtor

Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company

And afterwards, to wit, 6th day of March, 1945, come the parties aforesaid by their counsel aforesaid, and this

case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 17th day of July, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 125] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8812

IN the Matter of HOBOKEN MANUFACTURERS RAILROAD COMPANY, Debtor

FORREST S. SMITH, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

v.

HOBOKEN RAILROAD, WAREHOUSE AND STEAMSHIP CONNECTING COMPANY, and Hoboken Land and Improvement Company

Appeal from Order of the District Court of the United States for the District of New Jersey

Before Biggs, Maris and Goodrich, Circuit Judges

OPINION OF THE COURT—Filed July 17, 1945

By BIGGS, Circuit Judge:

The substantial question presented by the appeal at bar is a narrow one: Is the landlord-lessor, one of the appel- [fol. 126] lees herein, entitled to terminate a ninety-nine year lease made in 1906 to the debtor-lessee of a railroad right-of-way and its subservient properties and resume occupancy, because of a breach of terms of the lease? Two "tie-in" leases by their terms must stand or fall with the principal lease just referred to and need not be discussed in this opinion.

The pertinent language of the indenture executed on June 19, 1906 is as follows: "The Lessee shall not and will not sell, assign or transfer this lease or underlet the demised premises, * * * without the previous consent of the Lessor. * * * This covenant shall also apply to any unauthorized sale or transfer thereof or underletting of the demised premises, * * * whether made by the Lessee or in any proceeding, whether at law or in equity or otherwise, to which the Lessee may be a party, whereby any of the rights, duties and obligations of the Lessee shall or may be transferred, encumbered, abrogated or in any manner altered, without the consent of the Lessor first had and obtained. * * *." The debtor is in reorganization proceedings instituted pursuant to Section 205 of Title 11 of the United States Code, Section 77 of the Bankruptcy Act. A trustee was appointed for the debtor. He adopted the lease pursuant to the direction of the court below. It should be pointed out that Section 110b of Title 11 provides that "an express covenant that an assignment by operation of law or the bankruptcy of a specified party * * * [to a lease], * * * shall terminate the lease * * * shall be enforceable." Subparagraph (1) of Section 205 provides: "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor, and the right and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

The appellant trustee, makes three contentions. He contends first that only if a lease expressly provides that it shall terminate on bankruptcy can an adjudication in bank- [fol. 127] ruptcy effect a termination, citing such authorities as Gasley v. Williams, 210 U. S. 41, and in Re Prudential Lithograph Co., 265 F. 869, aff'd 270 F. 469, cert. den. 256 U. S. 692. He concedes that an express provision in a lease giving the lessor the right to terminate the lease on the bankruptcy of the lessee is enforceable. See In re Wil-low Cafeterias, 95 F. 2d 306. It is clear that in the case at bar there was a breach of the lease for the rights, duties and obligations of the lessee were transferred, abrogated and altered by the assumption by the trustee of the rights of the debtor in the property. Though the lease does

not refer to bankruptcy it does provide expressly for forfeiture if a transfer of the lease or an underletting of the premises is effected, unauthorized by the lessor, in any proceeding to which the lessee is a party "whether at law or in equity or otherwise."

This language of the lease falls within the purview of Section 110b of Title 11 of the United States Code. The parties to the lease obviously had in mind an equity receivership or an ordinary proceeding in bankruptcy as such proceedings existed in 1906 and which might have brought about a transfer or an "underletting" of the premises by operation of law and contrary to the wishes of the landlord-lessor. The provisions of subparagraph (l) of Section 205 categorize the proceeding at bar and the rights of persons in connection with property of the debtor as if the proceeding were one in which a voluntary petition in bankruptcy had been filed and an adjudication had been made thereon. The decision of the Supreme Court in Finn v. Meighan, —— U. S. ——, is helpful, though in that case the pertinent provision of the lease specified the filing of a "petition in bankruptcy." Since the phrase "whether at law or in equity or otherwise," employed to denominate the proceedings which may terminate the lease by breach of its provisions must be deemed to include ordinary bankruptcy proceedings, we have no difficulty in concluding, as did the court below,[1] that the lease was breached when it [fol. 128] was adopted by the trustee and the landlord-lessor is entitled to re-enter the premises.

The appellant's second contention is that the termination of the lease and the order allowing re-entry by the lessor were premature because they preceded consideration of a plan of reorganization. This position seems also to be without merit. The appellant relies on the principle enunciated in Continental Bank v. Rock Island Ry., 294 U. S. 648, but we think that decision is inapplicable. The Rock Island system consisted of over 8,000 miles of right-of-way running through many States. The railroad had a complicated financial structure and it would have been impossible to prepare a plan of reorganization if there had been recurring sales of its securities. Consequently the court enjoined such sales pending the submission of a plan of

[1] See 56 F. Supp. 187.

reorganization. The debtor in the case at bar is a short switching railroad having nine miles of main stem track. It has no outstanding bonds or other evidences of indebtedness. No securities are involved. All of the debtor's stock is owned by Seatrain Lines, Inc. It appears that the Section 77 petition was filed by the debtor because it desired to procure a lease of the railroad on more favorable terms. Under the circumstances it can scarcely be held that the court below has abused its discretion in permitting a reentry by the landlord.

The final point raised by the trustee is that the order complained of is improvident because it requires that all of the property of the debtor in the possession or control of the trustee and used for railroad purposes, be delivered to the landlord. The trustee points out that there are undetermined claims in respect to some of this property. But the property subject to dispute is inconsequential, consisting only of two lengths of track 265 feet in length, leading to a dead-end siding, and another 20 foot length of track, leading to a float-bridge. But the order complained of is a wise one for it permits the operation of this small trackage as a part of the main stem of the railroad and in addi- [fol. 129] tion provides means whereby the contested claims may be disposed of promptly.

The order appealed from is affirmed.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 130] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1944

No. 8812

In the Matter of Hoboken Manufacturers Railroad Company, Debtor

Forrest S. Smith, Trustee of the Property of Hoboken Manufacturers Railroad Company, Debtor; the Debtor, Hoboken Manufacturers Railroad Company; and Seatrain Lines, Inc., a Creditor, Appellants,

vs.

Hoboken Railroad, Warehouse and Steamship Connecting Company, and Hoboken Land and Improvement Company

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this case be, and the same is hereby affirmed with costs.

By the Court, Biggs, Circuit Judge.

July 17, 1945.

Endorsements: Order Affirming District Court Order. Received & Filed July 17, 1945. Wm. P. Rowland, Clerk.

[fol. 131] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendices to the Briefs of Appellants and Appellees, as constituting the portions of the record before this court at argument; and proceedings in this court, in the Matter of

Hoboken Manufacturers Railroad Company, Debtor, No. 8812 on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 31st day of July in the year of our Lord one thousand nine hundred and forty-five, and of the Independence of the United States the one hundred and seventieth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 122] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI Filed October 22, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. The Solicitor General is invited to file a brief and participate in the oral argument as amicus curiae if he is so advised.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.